***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

# 75-7701

In The

## United States Court of Appeals

For The Second Circuit

ESTHER JACOBY,

*Plaintiff-Appellee-Appellant,*

*vs.*

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

*Defendants-Appellants-Appellees.*

*On Appeal from Final Order and Judgment of the United States District Court for the Southern District of New York*
*Below, Lawrence W. Pierce, U.S.D.J.*

UNITED STATES COURT OF APPEALS
FILED
APR 19 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

## APPENDIX

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RELEVANT DOCKET ENTRIES

72 Civ. 5441 Esther Jacoby v. Alfred B. Averell, et al.

| DATE | PROCEEDINGS |
|---|---|
| 12/29/72 | Filed complaint and issued summons. |
| 2/14/73 | Filed summons with marshal's return. Served Charles M. Edwards, Jr. on 2/8/73. |
| | Also served: Donald B. Gomes by Mrs. Gomes, wife, on 1/16/73. |
| | Also served: Solomon Rogoff by Roger Zissu on 1/3/73. |
| | Also served: Stanley Simon on 1/2/73. |
| | Also served: Horace R. Zimmerman by Roger Zissu on 1/3/73. |
| | Also served: Alfred Zissu by Roger Zissu on 1/3/73. |
| | Also served: Vornado, Inc. by Roger Zissu on 1/3/73. |
| 2/23/73 | Filed Notice to Produce. |
| 3/12/73 | Filed Defendants' Notice of Motion. Re: Dismissal (Vincenti & Schickler). |
| 3/12/73 | Filed Defendants' Memorandum of Law in Support of Motion |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|---|---|
| 11/12/73 | Filed Stipulation of Facts. |
| 11/12/73 | Filed Attachments to Stipulation of Facts. |
| 1/16/74 | Filed Opinion #40231. The Court found that the 1/16/70 amendment violated the 1968 Plan and the option agreements granted pursuant thereto are null and void. The Court further found that there had been no violation of Sections 10(b) and 14 of the Securities Exchange Act of 1934. |
| 1/17/74 | Filed letter from Vincenti & Schickler to Judge Pierce, dated 12/21/73. |
| 1/17/74 | Filed Defendants' Memorandum of Law. |
| * | Filed Plaintiff's Memorandum of Law. |
| 1/30/74 | Filed Judgment. Plaintiff shall have judgment against defendants (who appeared) voiding the 1/16/70 amendment. Defendants to account for damages. Judgment granted defendants dismissing plaintiff's §§10(b) and 14 claims. |
| 4/17/74 | Filed Defendants' Report of Cancellation of Amended Options. |
| 12/5/74 | Filed Order of Referral on Award of Attorneys' Fees to Plaintiff's Attorneys and Accountants. Referred to Magistrate Goettel for Hearing and Recommendation. |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|---|---|
| * | Filed Affidavit of Plaintiff in Support of Plaintiff's Application for Attorneys and Accountants Fees. |
| * | Filed Plaintiff's Memorandum of Law in Support of Application. |
| 5/27/75 | Filed Defendants' Affidavit in Opposition to Plaintiff's Application for Fees. |
| 5/27/75 | Filed Defendants' Memorandum of Law in Opposition to Plaintiff's Application for Fees. |
| 5/27/75 | Hearing held before Magistrate Goettel. |
| 6/30/75 | Filed Report and Recommendation of Magistrate Goettel, dated 6/25/75, recommending plaintiff's attorneys be awarded $10,000 plus disbursements. |
| 9 22/75 | Filed Defendants' Affidavit in Support of Motion to Disaffirm Magistrate Goettell's Report and Recommendation. |
| 9/22/75 | Filed Defendants' Memorandum of Law in Support of Motion to Disaffirm Magistrate Goettel's Report and Recommendation. |
| 9/22/75 | Filed Plaintiff's Affidavit in Support of Motion to Confirm a part of Magistrate Goettel's Report Granting a Fee and Disaffirm part Granting only $10,000 in fees. |

Relevant Docket Entries

| DATE | PROCEEDINGS |
|---|---|
| 9/22/75 | Filed Plaintiff's Memorandum of Law in Support of Motion. |
| 11/19/75 | Filed Opinion of Judge Pierce #43425. Adopts amount recommended by Magistrate Goettel. Plaintiff's counsel is to receive $10,000 in fees plus $211.44 in disbursements. |
| 12/23/75 | Filed Final Order and Judgment. Ordered Plaintiff's counsel, Garwin & Bronzaft, to receive attorneys' fees in the amount of $10,000 plus $211.44 in disbursements, within 7 days of the date of the entry of the Order & Judgment. |
| 1/14/76 | Filed Plaintiff's Notice of Appeal From Final Order and Judgment of Judge Pierce Filed 12/23/75, insofar as it limits the award of fees to $10,000. |
| 1/20/76 | Filed Defendants' Notice of Appeal from Judge Pierce's Final Order and Judgment Filed 12/23/75, which awards Plaintiff's counsel $10,211.44. |

* These documents were submitted before Magistrate Goettel and served upon defendants but they were never filed with the Clerk's Office and do not appear on the docket sheet.

# United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

7Y CIVIL ACTION FILE NO. 5441

Judge Pierce

ESTHER JACOBY,

Plaintiff

v.

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendant

SUMMONS

PLAINTIFF DEMANDS TRIAL BY JURY

To the above named Defendants :

You are hereby summoned and required to serve upon

GARWIN & BRONZAFT

plaintiff's attorneys, whose address is 1501 Broadway, New York, New York 10036

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JOHN LIVINGSTON
Clerk of Court.

S/ B. EDWARDS
Deputy Clerk.

Date: Dec 29 1972

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - x

ESTHER JACOBY,

Plaintiff,

-against-

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - x

COMPLAINT

PLAINTIFF DEMANDS TRIAL BY JURY

Plaintiff, by her attorneys, complaining of the defendants, alleges the following on information and belief, except as to paragraphs "1" and "2", which are alleged upon knowledge:

1. (a) Plaintiff is a stockholder of Vornado, Inc. ("Vornado") and has continuously owned stock from prior to July 1, 1968 to the present time.

(b) Plaintiff is a citizen of the State of Pennsylvania.

2. Plaintiff brings this action derivatively on behalf of Vornado.

3. (a) Vornado is a corporation organized under the laws of the State of Delaware with its principal place of business in the State of New York.

(b) The claims alleged herein arise under the Securities Exchange Act of 1934 ("Act") including §10(b) and §14 and under the rules and regulations issued pursuant to said Act, including Rule 10(b)-5 and under the common law.

(c) The acts and transactions complained of occurred in substantial part within the Southern District of New York.

(d) Jurisdiction of the Court rests upon §27 of the Act and the rules and regulations promulgated under said Act and diversity of citizenship.

(e) Diversity of citizenship jurisdiction is asserted only with respect to defendants who are not citizens of the State of Pennsylvania.

(f) The defendants, with respect to whom diversity of citizenship jurisdiction is asserted, are citizens of states other than Pennsylvania.

(g) The amount in controversy, exclusive of interest and costs, exceeds $10,000.

(h) This suit is not a collusive one to confer upon this Court jurisdiction of an action of which it would not otherwise have jurisdiction.

4. The shares of the common stock of Vornado are presently being traded on the New York Stock Exchange, a national securities exchange, as defined by the Act.

5. The following individuals were directors of Vornado during the period set forth opposite their names and at various times held the positions with Vornado listed next to their names:

| | | |
|---|---|---|
| Alfred B. Averell | | 1957 - 1972 |
| Charles M. Edwards, Jr. | | 1963 - date |
| Donald B. Gomes | Exec. Vice Pres. | 1964 - 1972 |
| George I. Kern | | 1972 - date |
| Alvin C. Martin | Secretary | 1967 - date |
| Solomon Rogoff | Senior Vice Pres., President | 1971 - date |

| | | |
|---|---|---|
| Murray J. Siegel | President | 1960 - 9/21/71 |
| Stanley Simon | | 1960 - date |
| Horace R. Zimmerman | Vice President | 1971 - date |
| Frederick Zissu | Chairman of the Bd. | 1944 - date |
| Leo Zwiebach | Senior Vice Pres. | 1963 - 1/14/71 |

6. On April 16, 1968, the Board of Directors of Vornado adopted a qualified stock option plan (hereinafter "Plan") which was approved by the stockholders on June 4, 1968. Said Plan is annexed hereto, marked Exhibit "A" and made a part hereof.

7. As of January 15, 1970, Vornado had granted options under the Plan to purchase 283,500 shares of Vornado's common stock at prices ranging from $23.00 to $25.07 per share.

8. On January 16, 1970, the Board of Directors of Vornado, without prior stockholder approval, amended option contracts outstanding under the Plan so as to permit the exercise of options to purchase Vornado's stock at $14.69 per share, provided, however, that said options may be exercised at $14.69 per share only during the period between the expiration of the five year term under the original option contract and January 15, 1975, and only to the extent not previously exercised.

9. The following individual defendants were among the recipients on January 16, 1970 of the modified options to purchase common stock of Vornado at $14.69 per share:

| | |
|---|---|
| Frederick Zissu | 25,000 shares |
| Murray J. Siegel | 25,000 shares |
| Donald B. Gomes | 10,000 shares |
| Leo Zwiebach | 8,000 shares |
| Alvin C. Martin | 1,000 shares |
| Horace R. Zimmerman | 5,000 shares |
| Solomon Rogoff | 5,000 shares |

10. The names of the other optionees whose options to purchase approximately 204,000 shares of stock were modified on January 16, 1970 by Vornado, are unknown to plaintiff at this time.

11. As of January 16, 1970, the Board of Directors of Vornado and its subcommittees did not have the power or authority, without stockholder approval, to reduce the price under which an option could be exercised to less than the fair market value of stock on the date the option was granted, nor to extend the period during which an option could be exercised to a period longer than five years.

12. The amendment of the options on January 16, 1970 was null and void for the following reasons:

(a) There was no authority given to the Board of Directors to modify the options so as to permit the options theretofore granted to be exercised at lower prices than the fair market value at the date the options were granted.

(b) There was no authority given to the Board of Directors to extend the time during which the options could be exercised for a period in excess of five years after the date of the grant.

(c) At least 50% of the Board of Directors were beneficiaries and were unjustly enriched by the modification of the options to permit their exercise at prices lower than the fair market value of said stock on the date the option was granted.

(d) At least 50% of the Board of Directors were beneficiaries and were unjustly enriched by reason of the modification of the Plan to permit their exercise for a period in excess of five years.

(e) There was no majority of disinterested directors which could or did authorize the modification of the Plan or of the option agreements.

(f) There was no consideration for the modification of the options.

(g) At the time that the Plan was approved by the Board of Directors, it required, as a prerequisite, to become effective that the Plan receive stockholder approval. There was no request for and no approval given by the stockholders permitting the option contracts to be amended so that they could be exercised at a price which was lower than the fair market price at the time said options were granted, or permitting the amendment of the option contracts so as to permit the option to be exercised for a period in excess of five years from the date of the granting thereof. Stockholder approval of the aforesaid amendments was a prerequisite to said amendments' becoming valid and binding.

13. Since January 16, 1970, Vornado's common stock has sold on the New York Stock Exchange at prices in excess of $29.37 per share.

14. The reduction of the price at which the option to purchase Vornado's stock under the Plan could be exercised by the optionees, constituted spoliation and waste of the assets of

Vornado and constituted a gift by Vornado of its assets to said optionees and particularly to those optionees who were officers and directors of Vornado.

15. The defendants, directly or indirectly, made use of the means and instrumentalities of interstate commerce, of the mails and of the facilities of the New York Stock Exchange in connection with the actions, practices and course of business alleged herein.

16. By the acts and conduct herein alleged, defendants employed devices, schemes and artifices to defraud; made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading; and engaged in acts, practices and a course of business which operated and were calculated to operate as a fraud and deceit upon Vornado; all in connection with the purchase and sale of securities, to wit, shares of Vornado's stock, in violation of §10(b) and Rule 10(b)5 promulgated thereunder.

17. Defendants who were directors of Vornado at the time of the transactions alleged herein, knew or should have known that the modification of the options to purchase 283,500 shares of stock at prices of $23.00 to $25.07 to permit said stock to be purchased at $14.69 per share and extending the period during which the options could be exercised, for no consideration, was intended to enable the optionees to acquire Vornado's shares at grossly inadequate prices, in violation of the terms of the Plan.

18. Defendants violated their fiduciary duty to Vornado and its stockholders by modifying the options to permit the purchase of Vornado's stock at a price of $14.69 per share and extending the period during which said options could be exercised. Said modifications of the options were known to the defendants to have been granted for no consideration and solely in order to enrich the optionees, and particularly said optionees who were officers and directors of Vornado.

19. The Board of Directors of Vornado issued proxy statements which were false and misleading in the following respects:

(a) Said proxy statements failed to disclose that the Board of Directors of Vornado had, on January 16, 1970, modified outstanding stock options in violation ofthe terms and provisions of the Plan, by lowering the price at which the options could be exercised below the fair market value of the stock at the time the options were originally granted.

(b) Said proxy statements failed to disclose that as of January 16, 1970, the Board of Directors of Vornado had modified outstanding stock options in violation of the provisions of the Plan in that said options could be exercised during a period of more than five years.

(c) The proxy statements issued prior to January 16, 1970 failed to disclose that the Board of Directors had the authority without the consent of the stockholders to reduce the price at which the option could be exercised to a price below the fair market value of the stock at the time the options were

originally granted.

(d) The proxy statements issued prior to January 16, 1970 failed to disclose that the Board of Directors had the authority, without the consent of the stockholders, to extend the life of the option to a period in excess of five years from the date of grant.

20. The exact amount of profits realized and realizable by the individual defendants and the other optionees and the exact amount of damages sustained or to be sustained by Vornado are presently unknown to plaintiff.

21. Demand on the Board of Directors of Vornado to bring this action would be futile for the following reasons:

(a) A majority of the Board of Directors of Vornado participated in and had knowledge of and acquiesced in the transactions which are the subject matter of this complaint;

(b) Institution of this action by the Directors would prevent effective prosecution because said Directors would be defendants in this action.

WHEREFORE, plaintiff, on behalf of herself and all others similarly situated, respectfully demands judgment against the defendants as follows:

(a) That the modification of the options made as of January 16, 1970 be declared null and void;

(b) that the individual defendants and all optionees whose options were modified to enable them to purchase stock at lower prices be enjoined from exercising the options as modified;

(c) that the individual defendants account to Vornado for all profits realized by any of the optionees whose options were ' under the Plan;

endants account for all losses and damages susta by Vornado as a result of the matters set forth above;

(e) that the plaintiff be allowed the costs and disbursements of this action, including reasonable attorneys' fees and accountants' fees;

(f) that the plaintiff have such other and further relief as the Court may deem proper.

Dated: New York, New York
December 7th, 1972

GARWIN & BRONZAFT

By: /s/ Bertram Bronzaft
A Member of the Firm
Attorneys for Plaintiff
1501 Broadway
New York, New York 10036
Tel: (212) CH 4-5050

STATE OF Pennsylvania )
: ss.:
COUNTY OF Philadelphia )

ESTHER J. COBY, being duly sworn, deposes and says that she is the plaintiff in the within action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters she believes them to be true.

Esther Jacoby
ESTHER JACOBY

Sworn to before me this 19th.
day of December, 1972

Rhoda Rosenman
Notary Public
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires October 22, 1973

## EXHIBIT A

## VORNADO, INC.

## 1968 QUALIFIED STOCK OPTION PLAN

1. **Purposes.** The purposes of the plan ("Plan") are to provide an incentive to key employees of Vornado, Inc. and its subsidiaries ("Company"), including officers and directors who are employees, to contribute to the success of the Company by purchasing a proprietary interest in the Company, and to offer an additional inducement in obtaining and retaining the services of key personnel. Purchases shall be made in accordance with "qualified stock options" issued pursuant to the Internal Revenue Code of 1954, as amended ("Code").

2. **Stock Subject to the Plan.** Options may be granted under the Plan to purchase in the aggregate not more than 297,000 shares of Vornado's Common Stock, par value $.04 per share ("Common Stock"). Any shares subject to an option which for any reason expires or is terminated unexercised as to such shares, shall again become available for options under the Plan.

3. **Administration and Selection.** The Plan shall be administered by a committee designated as the Stock Option Committee ("Committee") consisting of not less than three nor more than five directors of Vornado to be appointed by, and to serve at the pleasure of, the Board of Directors. The Committee shall have full power to interpret the Plan, and to establish and amend rules and regulations for its administration. The Board of Directors may from time to time appoint members of the Committee in substitution for or in addition to members previously appointed and may fill vacancies, however caused, in the Committee. The Committee shall hold its meetings at such times and places as it shall deem advisable. A majority of its members shall constitute a quorum. Action of the Committee shall be taken by a majority of its members at the meeting. Any action may be taken by a written instrument signed by a majority of the members and action so taken shall be fully as effective as if it had been taken by a vote of a majority of the members at a meeting duly called and held.

4. **Eligibility.** The Committee may grant options from time to time to key employees of the Company, including officers and directors who are employees, for such number of shares of Common Stock as it may determine. Options granted to members of the Committee shall be ratified by a majority of the Board of Directors.

5. **Option Price.** The purchase price of the Common Stock under each option shall not be less than the fair market value of the Common Stock on the date the option was granted. Such fair market value shall be determined by the Committee consistently with any rules or regulations applicable to "qualified stock options".

6. **Term of Options.** The term of each option granted pursuant to the Plan shall be for a period not exceeding five (5) years from the date of granting thereof. Options shall be subject to earlier termination as hereinafter provided.

7. **Exercise of Options.** Each option shall become exercisable as to twenty-five (25%) percent of the aggregate number of shares originally subject thereto commencing eighteen (18) months from the date of grant and as to an additional twenty-five (25%) percent after each succeeding twelve month period, provided, however, that the right to purchase shall be cumulative. If the full number of shares available for purchase in a period shall not be purchased, the balance may be purchased at any time or from time to time thereafter but prior to the termination of such option. The Committee, in its discretion, may grant options or accelerate the exercise of options granted so that options are exercisable over a shorter period of time than that stated above.

An option shall be exercised by giving written notice to the Company at its executive offices, specifying the number of shares purchased and accompanied by payment in full in cash of the aggregate purchase price thereof. In no case may a fraction of a share be purchased or issued pursuant to the exercise of an option.

8. **Prior Outstanding Options.** Any option granted to an optionee shall not be exercisable while any options previously granted to him to purchase Common Stock at a higher price under this or any other option plan of the Company remain outstanding within the meaning of Section 422(c)(2) of the Code.

9. **Termination of Employment.** Any option holder whose employment has terminated for any reason other than death may exercise his option within 3 months after the date of such termination, or within such shorter period, if any, specified in his option contract, to the extent the option was exercisable on the date of such termination. Options granted under the Plan shall not be affected by any change of employment so long as the holder continues to be an employee of the Company or of a corporation issuing or assuming the option in a transaction to which Section 425(a) of the Code applies.

10. **Death of Employee.** If an option holder dies while employed by the Company or within the period after termination of his employment during which the option is exercisable, the option may be exercised to the extent exercisable on the date of his death, by his executor, administrator or other person at the time entitled by law to his rights under the option, at any time within six (6) months after death, but in no event after the expiration of the term of the option.

11. **Option Contracts.** Each option shall be evidenced by an option contract which shall contain such provisions (not necessarily identical) as the Committee shall deem appropriate or advisable. Nothing in the Plan shall confer any rights on any employee other than those set forth in the option contract, and neither the Plan nor the option contract shall confer upon any employee any rights to continue in the employ of the Company or interfere in any way with the rights of the Company to terminate his employment at any time without liability by the Company.

12. **Adjustments.** Notwithstanding any other provision of the Plan, in the event of any change in the outstanding Common Stock by reason of a share distribution, recapitalization, merger, consolidation, split-up, combination or exchange of shares, or the like, the aggregate number and kind of shares available under the Plan and the number and kind of shares subject to each outstanding option and the option price shall be appropriately adjusted by the Committee.

13. **Amendment and Termination.** The Committee may at any time suspend or terminate the Plan or amend it from time to time in such respects as it may deem advisable to provide that options granted hereunder may qualify as "qualified stock options" under the Code or any comparable provisions thereafter enacted and conform to any change in applicable law or to regulations or rulings of administrative agencies, or may so amend it in any other respect not involving a substantial departure from the principles herein set forth. No amendment by the Committee shall serve to alter the class of persons eligible to receive options hereunder, or, except as provided in Section 12, increase the maximum number of shares with respect to which options may be granted hereunder. Unless sooner terminated by the Committee, the Plan shall terminate on June 3, 1978.

14. **Non-Transferability of Options.** No option granted under the Plan shall be transferable otherwise than by will or the laws of descent and distribution; and an option may be exercised during the lifetime of the holder thereof only by him.

15. **Effective Date of the Plan.** This Plan shall be submitted to the stockholders of Vornado at the annual meeting in 1968, and if approved by the stockholders shall become effective on the date of such approval.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER JACOBY,

Plaintiff,

-against-

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendants.

STIPULATION OF FACTS

72 Civ. 5442

IT IS STIPULATED AND AGREED by and between GARWIN & BRONZAFT, ESQS., the attorneys for the plaintiff, and VINCENTI & SCHICKLER, ESQS., the attorneys for the defendants ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC., that this action shall be adjudicated with the same force and effect as if a trial had been held and the following agreed facts and attachments had constituted the evidence at the said trial:

1. This action, commenced on December 29, 1972, is a shareholder's derivative suit grounded on Sections 10(b) and 14 of the Securities Exchange Act of 1934 and the common law.

2. The plaintiff became the owner of fifty (50) shares of Vornado, Inc., common stock on July 1, 1968, and has owned said shares continuously until the present date.

3. The defendant, Vornado, Inc. is a Delaware corporation with its principal place of business in the State of New Jersey. The plaintiff is a citizen of the

State of Pennsylvania. None of the individual defendants named herein are citizens of the State of Pennsylvania.

4. Of the individual defendants named in the complaint, Alfred B. Averell, Charles M. Edwards, Jr., and Donald B. Gomes have not been served with process in this action, and all of the other defendants have appeared herein. The individual defendants named in the complaint were, each of them, directors of the defendant Vornado on April 16, 1968, or became directors thereafter, as set forth below, and continued as such to the following dates:

| | |
|---|---|
| Alfred B. Averell | Until January 6, 1972 |
| Charles M. Edwards, Jr. | To present |
| Donald B. Gomes | Until July 17, 1972 |
| Alvin C. Martin | To present |
| Solomon Rogoff | October 19, 1971 to present |
| Stanley Simon | To present |
| Horace R. Zimmerman | February 2, 1971 to present |
| Frederick Zissu | To present |

5. On April 16, 1968, the Board of Directors of Vornado adopted the Vornado 1968 Stock Option Plan (the "Plan"). A copy of the Plan is annexed hereto as Attachment "1".

6. On or about May 6, 1968, Vornado sent to all of its shareholders a notice of meeting and proxy statement for the annual meeting of stockholders of Vornado, to be held on June 4, 1968. The proxy statement described the proposed Plan and contained a copy thereof. A copy of the

proxy statement is annexed hereto as Attachment "2".

7. The shareholders of Vornado approved the Plan at the annual meeting on June 4, 1968. Neither Vornado's certificate of incorporation nor its by-laws contain any provision requiring shareholder approval for the granting of stock options to officers and employees. The Plan is a "qualified" Plan within the meaning of the Internal Revenue Code of 1954.

8. The Plan directed the Board to appoint a Stock Option Committee ("Committee") consisting of not less than three (3) nor more than five (5) of the directors of Vornado to administer the Plan (Par. 3 of the Plan). The following four directors were duly appointed and were serving as members of the Committee as of January 16, 1970:

| | |
|---|---|
| Frederick Zissu | Chairman of the Board of Directors of Vornado |
| Murray J. Siegel | President of Vornado |
| Alvin C. Martin | Secretary of Vornado |
| Stanley Simon | Partner in Stanley Simon & Associates |

Of the named individuals, only Stanley Simon ("Simon") is an outside director and not eligible to receive any options under the Plan.

In September of 1971, Murray J. Siegel died. On or about June 6, 1972, Solomon Rogoff was appointed to the Committee. Mr. Rogoff is eligible to receive options under the Plan.

With that change, the Committee continues with the membership named above to the present time.

9. The Plan authorized the Committee to issue options for an aggregate of no more than 297,000 shares of Vornado's common stock.

10. Pursuant to the Plan, the Committee, during 1968 (following the Plan's adoption), 1969 and prior to January 16, 1970, granted to approximately 363 officers and employees of Vornado five-year options to purchase an aggregate of approximately 283,500 shares of Vornado's common stock at a price equal to the market value of the shares on the date of the grant. The prices ranged from $23.00 to $25.07 per share. The aggregate total number of shares subject to these options, which at any time from the adoption of the Plan to date, were issued to officers who were directors of Vornado at the time of the issuance of the options, constituted 69,000 shares. This included the following number of shares issued to the following officer-directors who are no longer officer-directors and whose options, therefore, terminated unexercised: Leo Zwiebach (deceased) - 8,000 shares; Donald Gomes (no longer with Vornado) - 10,000 shares; Murray J. Siegel (deceased) - 25,000 shares. The additional officer-directors to whom options were issued pursuant to the Plan at the time that they were officer-directors, and the number of shares that they presently continue to hold subject to such options are: Frederick Zissu - 25,000 shares; Alvin C. Martin - 1,000 shares. At present, the following officer-directors of Vornado hold options granted under the Plan to purchase a total of 36,000 shares of the common stock of Vornado as

follows:

| | |
|---|---|
| Frederick Zissu | 25,000 shares |
| Alvin C. Martin | 1,000 shares |
| Horace R. Zimmerman | 5,000 shares |
| Solomon Rogoff | 5,000 shares |
| TOTAL | 36,000 shares |

(The options to acquire 5,000 shares each granted to Horace R. Zimmerman and Solomon Rogoff were granted prior to their becoming directors of Vornado.) Annexed hereto as Attachment "2A" are all of the minutes of the Committee from June 11, 1968 to November 21, 1972, involving any discussions, considerations or actions taken with respect to stock options. The minutes and/or the appended listings reflect all options granted under the Plan; the date of the grant; the option price; and the name of the optionee.

11. Individual stock option agreements were entered into with each of the officers and employees of Vornado who received the aforesaid stock options. Copies of the two forms of stock option agreements used are annexed hereto as Attachments "3" and "4." The only difference between the two forms is in Paragraph 7, which sets forth the optionees' rights with respect to termination of the option and exercise upon death. The form executed by employees having written employment contracts (Exhibit "3")

differs from that executed by employees without such written contracts (Exhibit "4") in that contract employees were all given three months after termination of employment (other than for cause or death) in which to exercise options to which they are entitled on the date of termination. Section 11 of the Plan specifically authorizes non-identical stock option agreements, and Section 9 specifically permits exercise upon such termination within three months after termination, "or within such shorter period, if any, to the extent specified in his contract".

12. On January 16, 1970, the Stock Option Committee held a meeting at which all Committee members were present. On January 16, 1970, the market value of the shares of Vornado common stock had fallen to $14.69 a share. At that meeting, the Committee unanimously adopted a resolution, the specific terms of which are hereinafter set forth:

> "Resolved, that the Stock Option Contracts issued to employees of the Corporation under the 1968 Qualified Stock Option Plan shall be modified so as to provide that the option can be exercised at a purchase price equal to today's fair market value for a five-year term, provided, however, that the option to purchase at today's fair market value shall not be exercisable prior to the expiration of the original five-year term and provided further that the number of shares that an employee can purchase at today's fair market value shall be reduced by the number of shares purchased by him upon any previous exercise of a stock option contract under the 1968 Qualified Stock Option Plan, and it is further
>
> RESOLVED, that amended Stock Option Contracts are to be prepared in accordance with the above resolution and that the Chairman of the Board or the President of the Corporation

is authorized on behalf of the Corporation to sign said contracts and that the Secretary of the Corporation attest such signature."

A copy of the minutes of the meeting of the Stock Option Committee of Vornado on January 16, 1970, is attached hereto as Attachment "5".

13. Following the adoption by the Committee of the foregoing resolution, the Board of Directors of Vornado, on the same date, viz., January 16, 1970, unanimously ratified, adopted and approved the resolution of the Stock Option Committee. In addition, at that meeting, the Board, as required by Section 4 of the Plan, ratified the action taken by the Committee insofar as it affected rights under the Plan of Messrs. Zissu, Siegel and Martin. Messrs. Zissu, Siegel and Martin abstained from the voting on the latter ratification as it pertained to each of them. A copy of the pertinent portions of the minutes of the meeting of the Board of Directors of Vornado on January 16, 1970, is attached hereto as Attachment "6."

14. If called to testify, Alvin C. Martin, Senior Vice President, Secretary and Director of Vornado, would testify that, in addition to the above positions, he served on Vornado's Stock Option Committee and participated in the Committee's January 16, 1970 meeting which dealt with the fact that the outstanding stock options had lost, for all practical purposes, their value as a means of enhancing the incentive of Vornado's officers and employees as had been contemplated by the 1968 Stock Option Plan, due to the fact that as part of an overall market decline, the market price

of Vornado's common stock on the New York Stock Exchange had fallen as of that date to a price of $14.69 per share. He would further testify that at the time there was considerable talk in the business community that the market decline created a danger that key executives would be tempted to move from one company to another in order to obtain options that were more in line with market conditions. He would also testify that these were the factors that governed the Committee's passage of the resolution set forth in full at Paragraph 12 of this Stipulation, and also in Attachment "7" hereto.

Further, he would testify that Vornado's Board of Directors meeting on January 16, 1970, after the Committee's meeting, unanimously ratified, adopted and approved the Committee's resolution, after weighing the same factors that the Committee had considered, and that of the total Board of eight, all of whom were present at this meeting, three (Messrs. Stanley Simon, Alfred Averell and Charles M. Edwards, Jr.) were outside directors, with no entitlement to receive options under the Plan.

15. If called to testify, Stanley Simon would testify that on January 16, 1970, he was a member of Vornado's Board of Directors and a member of the Stock Option Committee but was not an officer or employee of Vornado. He would further testify that he was present at the Committee meeting described in Paragraph 12 herein; that the general economic and stock market decline that began in 1970 was accompanied by a similar and substantial decline in the market price of the common stock of Vornado; that this situation

seriously jeopardized the effectiveness of the outstanding options in performing the basic purpose of the 1968 Stock Option Plan, which was to provide officers and employees with a strong incentive for high performance and continuity of employment with the Company; that the foregoing was discussed at the Committee meeting and was the basis for the Committee adopting the resolution set forth in Paragraph 12.

Further, Mr. Simon would testify that the Board of Directors convened on January 16, 1970, shortly after the Committee's meeting was adjourned and after reviewing all of the factors that the Committee considered, unanimously ratified, adopted and approved the Committee's resolution.

16. Vornado immediately thereafter entered into an agreement with each of the approximately 363 Vornado employees implementing the January 16, 1970 action of the Committee, as ratified by Vornado's Board of Directors. A copy of the form of the Amended Stock Option Agreement dated January 16, 1970 modifying the outstanding option agreement is annexed hereto as Attachment "7". Pursuant to the terms of the resolution adopted by the Committee set forth in Paragraph 12 hereinabove providing " . . . that the option to purchase at today's fair market value shall not be exercisable prior to the expiration of the original five-year term . . .", none of the option rights granted by the Committee on January 16, 1970, became exercisable until July 1973, at the earliest. Moreover, pursuant to that same Committee resolution, the only shares of stock which

could be acquired by an optionee at the fair market value on January 16, 1970, were those subject to the option as originally issued but with respect to which the option was not exercised at the time of the expiration of its original five-year term.

17. On January 16, 1970, the fair market value of Vornado's common stock was $14.69 per share.

18. The current market price of common stock of Vornado is approximately $6.375 per share.

19. Specific stockholder approval of the action of the Committee and the Board respecting the options under the 1968 Stock Option Plan was neither sought nor obtained.

20. On or about April 30, 1970, Vornado sent to all of its shareholders a notice of meeting and proxy statement for the annual shareholders meeting to be held on June 2, 1970. A copy of that notice and proxy statement is annexed hereto as Attachment "8". The proxy statement contained, under the heading "Stock Options", the following description with respect to the action of the Committee and the Board on January 16, 1970:

**Stock Options**

The following tabulation shows as to certain directors and officers and as to all directors and officers as a group (i) the amount of options granted since the beginning of the previous full fiscal year, (ii) the amount of shares acquired since that date through the exercise of options granted since that date or prior thereto, and (iii) the amount of shares subject to all unexercised options held as of March 6, 1970:

**Shares of Common Stock**

| | Donald B. Gomes | Murray J. Siegel | Frederick Zisse | Lee Zwiebach | All directors and officers as a group |
|---|---|---|---|---|---|
| Granted—January 27, 1969 to date: | | | | | |
| Number of Shares (1) | 10,000 | 25,000 | 25,000 | 8,000 | 87,500(2) |
| Average Option Price per Share (1) | $14.69 | $14.69 | $14.69 | $14.69 | $14.69 |
| Exercised—January 27, 1969 to date: | | | | | |
| Number of Shares | — | — | 63,750 | — | 63,750 |
| Aggregate Option Price of Options Exercised | — | — | $793,751 | — | $793,751 |
| Aggregate Market Value of Shares at Date Options Exercised | — | — | $1,430,391 | — | $1,430,391 |
| Unexercised at March 6, 1970: | | | | | |
| Number of Shares | 10,000 | 25,000 | 88,750 | 8,000 | 151,250 |
| Average per Share Based on Original Option Price | $23.00 | $23.00 | $11.70 | $23.00 | $16.41 |
| Average per Share Based on Modified Option Price (1) | $14.69 | $14.69 | $ 8.92 | $14.69 | $13.30 |

(1) On January 16, 1970, the Company modified the option contracts under its 1968 Stock Option Plan so as to permit exercise of the options previously granted at higher prices at $14.69, the fair market value on January 16, 1970; provided, however, the said options may be exercised at $14.69 during the period between the expiration of the five year term under the original option contract and January 15, 1975, and only to the extent not previously exercised.

(2) Does not include options for 6,500 shares issued to certain officers of the Company during the fiscal year ended January 25, 1970 at an average option price of $24.11 per share. Such options are included in those options modified on January 16, 1970.

21. On or about April 30, 1971, Vornado sent to all of its shareholders a notice of meeting and proxy statement for the annual meeting of shareholders to be held on June 8, 1971. A copy of that notice and proxy statement is annexed hereto as Attachment "9". The proxy statement contained, under the heading "Stock Options", the following description with respect to the action of the Committee and the Board on January 16, 1970:

**Stock Options**

The following tabulation shows as to certain directors and officers and as to all directors and officers as a group (i) the amount of options granted since the beginning of the previous full fiscal year, (ii) the amount of shares acquired since that date through the exercise of options granted since that date or prior thereto, and (iii) the amount of shares subject to all unexercised options held as of March 5, 1971:

| Shares of Common Stock | Donald B. Gomes | Murray J. Siegel | Frederick Zeytoo | Lee Zwiebach (1) | All Directors and Officers as a Group |
|---|---|---|---|---|---|
| (i) Granted—January 26, 1970 to date: | | | | | |
| Number of Shares | — | — | — | — | 4,000 |
| Average Option Price per Share | — | — | — | — | $14.69 |
| (ii) Exercised—January 26, 1970 to date: | | | | | |
| Number of Shares | — | — | 38,250 | — | 38,250 |
| Aggregate Option Price of Options Exercised | — | — | $233,550 | — | $233,550 |
| Aggregate Market Value of Shares on Date Options Exercised | — | — | $767,486 | — | $767,486 |
| (iii) Unexercised March 5, 1971 | | | | | |
| Number of Shares | 10,000 | 25,000 | 50,500 | 2,000 | 112,500 |
| Average Per Share Based on Original Option Price | $23.00 | $23.00 | $15.94 | $23.00 | $19.67 |
| Average Per Share Based on Modified Option Price (2) | $14.69 | $14.69 | $11.04 | — | $13.05 |

(1) Mr. Zwiebach died on January 14, 1971. His options must be exercised within six (6) months of the date of his death.

(2) On January 16, 1970 the Company modified the option contracts under its 1968 Stock Option Plan so as to permit exercise of the options previously granted at higher prices at $14.69 the fair market value on January 16, 1970; provided, however, that said options may be exercised at $14.69 during the period between the expiration of the five year term under the original option contract and January 15, 1975 and only to the extent not previously exercised.

22. On or about April 25, 1972, Vornado sent to all of its shareholders a notice of meeting and proxy statement for its annual meeting to be held on June 6, 1972. A copy of that notice and proxy statement is annexed hereto as Attachment "10". The proxy statement contained, under the heading "Stock Options", the following description with respect to the action of the Committee and of the Board on January 16, 1970:

Shares of Common Stock

| | Donald B. Gomes | Frederick Zisso | Solomon Regos | Horace R. Zimmerman | Alvin C. Martin | All Directors and Officers as a Group (14 in group) |
|---|---|---|---|---|---|---|
| (i) Granted—January 31, 1971 to date: | | | | | | |
| Number of Shares | — | — | — | — | — | 2,000 |
| Average Option Price per Share | — | — | — | — | — | $27.23 |
| (ii) Exercised—January 31, 1971 to date: | | | | | | |
| Number of Shares | — | — | — | — | — | — |
| Aggregate Option Price of Options Exercised | — | — | — | — | — | — |
| Aggregate Market Value of Shares on Date Options Exercised | — | — | — | — | — | — |
| (iii) Unexercised at April 5, 1972: | | | | | | |
| Number of Shares | 10,000 | 50,500 | 5,000 | 5,000 | 1,000 | 100,000 |
| Average Per Share Based on Original Option Price | $23.00 | $15.94 | $23.41 | $23.00 | $24.57 | $19.27 |
| Average Per Share Based on Modified Option Price (1) | $14.69 | $11.04 | $14.69 | $14.69 | $14.69 | $13.10 |

(1) On January 16, 1970 the Corporation modified the option contracts under its 1968 Stock Option Plan so as to permit exercise of the options previously granted at higher prices at $14.69, the fair market value on January 16, 1970; provided, however, that said options may be exercised at $14.69 during the period between the expiration of the five year term under the original option contract and January 15, 1975 and only to the extent not previously exercised.

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23. No objection to the action of the Committee and/or the Board taken on January 16, 1970, or to any of the foregoing proxy statements was made to Vornado by plaintiff prior to the institution of this suit on December 29, 1972.

24. None of the option rights created by the Stock Option Committee's action on January 16, 1970, have been exercised. Attachment "11" annexed hereto is a schedule of shares acquired pursuant to the exercise of options under t e 1968 Stock Option Plan and the name of the optionees exercising said options. The number of shares acquired by optionees through exercise of the options issued pursuant to the 1968 Stock Option Plan totalled 9,900 shares.

25. The following five individuals who were members of Vornado's eight-man Board of Directors on January 16, 1970, had been granted previously under the Plan options to purchase the following shares and their rights under those options were affected by the actions taken on January 16, 1970, as aforesaid.

| Optionees Under the 1968 Plan | No. of Shares | Option Price Per Share | Expiration Date of Option |
|---|---|---|---|
| Donald B. Gomes | 10,000 | $23.00 | July 16, 1973 |
| Alvin C. Martin | 1,000 | 24.57 | October 28, 1973 |
| Frederick Zissu | 25,000 | 24.57 | October 28, 1973 |
| Murray J. Siegel | 25,000 | 23.00 | July 16, 1973 |
| Leo Zweibach | 8,000 | 23.00 | July 16, 1973 |

Murray J. Siegel and Leo Zweibach, officer-directors, both died in 1971, and Solomon Rogoff and Horace R.Zimmerman were elected to the Board in their stead

26. On January 16, 1970, Vornado had cont. ts of employment with Messrs. Zissu, Rogoff, Zimmerman, Siegel, and Edward Feldman, a Vice President. Gomes and Zweibach/ The period of employment under the

contract as it existed at that time terminated with respect to each of the foregoing on the following dates:

| | |
|---|---|
| Frederick Zissu | November 30, 1979 |
| Solomon Rogoff | November 30, 1974 |
| Horace R. Zimmerman | November 30, 1974 |
| Murray J. Siegel | November 30, 1979 |
| Donald B. Gomes | April 30, 1973 |
| Leo Zweibach | November 30, 1974 |
| Edward Feldman | November 30, 1974 |

None of these contracts were subject to earlier termination, without cause, unilaterally by Vornado.

27. On January 11, 1973, the Board of Directors of Vornado declared a seven percent (7%) stock dividend on its common stock, payable on April 10, 1973 to holders of record on February 28, 1973. In order to effectuate the stock dividend, pursuant to Paragraph 12 of the 1968 Stock Option Plan and to the stock option contracts, the total amount of 20,097 additional shares were reserved for the exercise of options granted under the Plan and the price per share for the exercise of such options was reduced, proportionately in accordance with the increase in the number of shares subject to options, from $14.69 to $13.73 per share.

28. Annexed hereto as Attachment "12" is a daily breakdown of market prices of Vornado's common stock on the New York Stock Exchange from January 2, 1968 through June 29, 1973.

29. Annexed hereto as Attachment "13" is the notice of the annual meeting of stockholders for June 3, 1969, and the proxy statement relating thereto.

30. There are in excess of 6,596,751 shares of Vornado common stock issued and outstanding, which are held by approximately 9,028 shareholders. Attachment "14" annexed hereto is the annual report of Vornado for 1971, and Attachment "15" is the annual report for 1972.

DATED: New York, New York
November 9, 1973

GARWIN & BRONZAFT

By _____
A Member of the Firm
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VINCENTI & SCHICKLER

By _____
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Simon, Zimmerman and
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225 Broadway
New York, New York 10007

DECISION PIERCE, D.J., January 16, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ESTHER JACOBY, :

Plaintiff, :

- v - : 72 Civ. 5441

ALFRED B. AVERELL, CHARLES M. :
EDWARDS, JR., DONALD B. GOMES, :
ALVIN C. MARTIN, SOLOMON ROGOFF, :
STANLEY SIMON, HORACE R. ZIMMERMAN, :
FREDERICK ZISSU and VORNADO, INC., :

Defendants. :

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APPEARANCES:

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LAWRENCE W. PIERCE, D.J.

MEMORANDUM OPINION

On December 29, 1972, plaintiff, a shareholder of Vornado, Inc. (Vornado), instituted this stockholder's

derivative action alleging that the defendants had violated the common law and Sections 10(b) and 14 of the Securities Exchange Act of 1934, by causing Vornado to amend certain qualified stock option agreements granted to officers and employees of Vornado, in violation of a certain Stock Option Plan adopted by Vornado on April 16, 1968. After pre-trial conference, the parties entered into a stipulation of facts and have agreed that "this action shall be adjudicated with the same force and effect as if a trial had been held and the . . . agreed facts and attachments had constituted the evidence at the said trial." I will therefore decide this matter as if a trial had been held before me.

A. FACTS

Vornado, Inc. is a Delaware corporation with its principal place of business in the State of New Jersey. (¶3).* On April 16, 1968, the Board of Directors of Vornado adopted the Vornado 1968 Stock Option Plan. (¶5). Neither Vornado's certificate of incorporation nor its by-laws contain any provision requiring shareholder approval for the granting

* The numbers in parentheses refer to the appropriate numbered paragraph in the Stipulation of Facts.

of stock options to officers and employees. (¶7). However, in order to qualify under the Internal Revenue Code of 1954 a stock option plan must be approved by the shareholders. Accordingly, a copy of the plan and a brief description of it were included in Vornado's May 6, 1968 proxy statement which was forwarded to Vornado's stockholders in connection with Vornado's June 6, 1968 annual meeting. (¶6). The shareholders of Vornado approved the plan at that meeting. (¶7).

The plan, a qualified stock option for purposes of section 422 of the Internal Revenue Code, (¶7) authorized the issuance of options to purchase a total of no more than 297,000 shares of Vornado's common stock. (¶9). In pertinent parts the plan provided as follows:

> 2. Stock Subject to the Plan. Options may be granted under the Plan to purchase in the aggregate not more than 297,000 shares of Vornado's Common Stock, par value $.04 per share ("Common Stock"). Any shares subject to an option which for any reason expires or is terminated unexercised as to such shares, shall again become available for options under the Plan.
>
> 3. Administration and Selection. The Plan shall be administered by a committee designated as the Stock Option Committee ("Committee") consisting of not less than three nor more than five directors of Vornado to be appointed by, and to serve at the pleasure of, the Board of Directors. The Committee shall have full power to interpret the Plan, and to establish

and amend rules and regulations for its administration. The Board of Directors may from time to time appoint members of the Committee in substitution for or in addition to members previously appointed and may fill vacancies, however caused, in the Committee. The Committee shall hold its meetings at such times and places as it shall deem advisable. A majority of its members shall constitute a quorum. Action of the Committee shall be taken by a majority of its members at the meeting. Any action may be taken by a written instrument signed by a majority of the members and action so taken shall be fully as effective as if it had been taken by a vote of a majority of the members at a meeting duly called and held.

5. Option Price. The purchase price of the Common Stock under each option shall not be less than the fair market value of the Common Stock on the date the option was granted. Such fair market value shall be determined by the Committee consistently with any rules or regulations applicable to "qualified stock options".

6. Term of Options. The term of each option granted pursuant to the Plan shall be for a period not exceeding five (5) years from the date of granting thereof. Options shall be subject to earlier termination as hereinafter provided.

8. Prior Outstanding Options. Any option granted to an optionee shall not be exercisable while any options previously granted to him to purchase Common Stock at a higher price under this or any other option plan of the Company remain outstanding within the meaning of Section 422(c)(2) of the Code.

13. Amendment and Termination. The Committee may at any time suspend or terminate the Plan or amend it from time to time in such respects as it may deem advisable to provide that options

granted hereunder may qualify as "qualified stock options" under the Code or any comparable provisions thereafter enacted and conform to any change in applicable law or to regulations or rulings of administrative agencies, or may so amend it in any other respect not involving a substantial departure from the principles herein set forth. No amendment by the Committee shall serve to alter the class of persons eligible to receive options hereunder, or, except as provided in Section 12, increase the maximum number of shares with respect to which options may be granted hereunder. Unless sooner terminated by the Committee, the Plan shall terminate on June 3, 1973.

15. Effective Date of the Plan. This Plan shall be submitted to the stockholders of Vornado at the annual meeting in 1968, and if approved by the stockholders shall become effective on the date of such approval.

Pursuant to the plan, the committee, during the next year and a half and up until January 16, 1970, granted to approximately 363 officers and employees of Vornado five year options to purchase an aggregate of 283,500 shares of Vornado's common stock at prices ranging from $23.00 to $25.07 per share. The prices were equal to the market value of the Vornado shares on the date of the grant. Among the shares optioned, the committee granted options to purchase a total of 69,000 shares to officers who were also directors of Vornado at the time of the issuance of the options. (¶10). Individual stock option agreements were entered into with each of the officers and employees of

Vornado who received the aforesaid stock options. (¶11).

By January 16, 1970, the market value of the shares of Vornado common stock had fallen to $14.69 per share. (¶12). On that date, the committee, all members being present, met to discuss modification of the outstanding option agreements and adopted the following resolution:

> RESOLVED, that the Stock Option Contracts issued to employees of the Corporation under the 1968 Qualified Stock Option Plan shall be modified so as to provide that the option can be exercised at a purchase price equal to today's fair market value for a five-year term, provided, however, that the option to purchase at today's fair market value shall not be exercisable prior to the expiration of the original five-year term and provided further that the number of shares that an employee can purchase at today's fair market value shall be reduced by the number of shares purchased by him upon any previous exercise of a stock option contract under the 1968 Qualified Stock Option Plan, and it is further
>
> RESOLVED, that amended Stock Option Contracts are to be prepared in accordance with the above resolution and that the Chairman of the Board or the President of the Corporation is authorized on behalf of the Corporation to sign said contracts and that the Secretary of the Corporation attest such signature. (¶12).

Following the adoption by the committee of the foregoing resolution, the Board of Directors of Vornado, on the same date, unanimously ratified, adopted and approved the resolution of the Stock Option Committee. (¶13). Vornado

immediately thereafter entered into an agreement with each of the approximately 363 Vornado employees holding options under the 1968 Plan implementing the January 16, 1970 resolution of the committee as ratified by Vornado's Board of Directors. (#16). Specific stockholder approval of the action of the committee and the Board respecting the options under the 1968 Stock Option Plan was neither sought nor obtained. (#19).

On or about April 30, 1970, Vornado sent to all of its shareholders a notice of meeting and a proxy statement for the annual shareholders meeting to be held on June 2, 1970. (#20). The proxy statement described for each officer and director of Vornado the number of options granted since the beginning of the previous full fiscal year, the number of shares acquired through the exercise of options granted and the number of shares subject to unexercised options as of March 6, 1970. In addition the proxy statement included the following statement:

> On January 16, 1970 the Company modified the option contracts under its 1968 Stock Option Plan so as to permit exercise of the options previously granted at higher prices at $14.69, the fair market value on January 16, 1970; provided, however, the said options may be exercised at $14.69 during the period between the expiration of the five year term under the original option contract and January 15, 1975 and only to the extent not previously exercised.

Substantially similar proxy statements were sent to the stockholders prior to the annual meetings held for the years 1971 and 1972. (¶21 & 22).

B. DISCUSSION

Plaintiff charges that the January 16, 1970 amendment to the 1968 Plan is null and void since it was violative of the terms thereof. It is further alleged that at least 50% of the Board members were unjustly enriched by reason of the 1970 amendment and that such action constituted waste and spoliation of the company's assets. Plaintiff also claims violations of section 10(b) of the Securities Exchange Act of 1934 and Rule 10(b)(5) promulgated thereunder as well as section 14 of the Act founded upon the claimed failure to disclose the alleged corporate illegality. The defendants, in substance, contend that the action taken on January 16, 1970 constituted the granting of new options under the 1968 Plan and that such action was just a routine management decision permitted by the plan and in no way in violation thereof. The defendants, of course, also contest the securities violation charge.

This case is on all fours with the recent decision of Judge Sylvester J. Ryan of this district in Waltzer v.

Billera et al., Civil No. 72-2052 (S.D.N.Y. filed May 23, 1972). (The parties herein have acknowledged the applicability of Judge Ryan's decision.) I find that opinion persuasive and will adopt its reasoning here.

In Waltzer, USI, a Delaware corporation, adopted a qualified stock option plan in 1967 which was approved by its stockholders. The plan was almost identical to Vornado's particularly as to the term of the option being five years from the date of the grant and the option price being the fair market value of the stock on the date of the grant.

Options were granted pursuant to the 1967 Plan at prices ranging between $20.50 and $34.50. By July 1970, however, the price of USI common stock had declined to about $12.00 per share. Following a management proposal, the committee on July 16, 1970 passed precisely the identical resolution that Vornado's committee had passed on January 16, 1970, namely modifying the original option by reducing the price of the option to the fair market value on the date of the meeting and allowing its exercise between the expiration date of the original option and July 15, 1975. However, whereas the committee in Waltzer that adopted the resolution amending the option on July 16, 1970 was comprised

of directors who could not be granted options under the plan, the committee in the instant case consisted of three directors who had received options prior to January 16, 1970. Further, USI's Board of Directors took no action on the committee's resolution, whereas here the Board of Directors which ratified, adopted and approved the committee's January 16, 1970 resolution, included five directors who were optionees under the plan on January 16, 1970. In both cases, management neither sought nor obtained shareholder approval of the amendment.

The defendants herein as the defendants in Waltzer contend that the plan permitted the granting of consecutive options on the same shares to the same individuals. They first assert that section 2 of the plan in no way prevents the corporation from granting such "tandem options". The last sentence of that section provides that "[a]ny shares subject to an option which for any reason expires or is terminated unexercised as to such shares, shall again become available for options under the Plan." The defendants argue that "[t]here is no indication that the Plan contemplated that [such] later options could not be granted until the prior options expired or were terminated [and that] the best argument that the

plaintiff has is that this provision of Section 2 of the Plan is entirely neutral." Defendants' Memo. at 21. That argument was aptly answered by Judge Ryan in Waltner as follows:

> According to defendants, the 1967 Plan permits the granting of consecutive options on the same shares to the same individual. In other words, defendants assert that under the plan USI could grant an option on 10 shares of USI common stock to employee X to be exercised within five years and at a subsequent date, before the termination of the five years while the option was still effective, grant another option on the same 10 shares to employee X for a five-year period but to be exercised between the date of the expiration of the first five-year period and the expiration of the second five year period. Examination of the language of the 1967 plan indicates that the above interpretation is erroneous. Paragraph 2 of the plan provides that:
>
> > "If an option shall expire or be terminated for any reason prior to the termination of the Plan without having been exercised in full, the unpurchased shares subject thereto shall become available for other options under the Plan." (emphasis added)
>
> In other words, the language is clear that a new option shall not be granted with respect to particular shares, which are already the subject of an option, until the first option has expired or been terminated. Accordingly, under the Plan, the July 16, 1970, amendments, whereby new options were granted with respect to particular shares already subject to existing options, were invalid. The fact that the

new options could not be exercised until after the termination of the existing options does not change this analysis. The language of paragraph 2 prohibits the granting of options with respect to shares subject to existing options.

It is true that under the By-laws and Certificate of Incorporation of USI, stockholder approval is not required to institute a stock option plan. Nevertheless, USI included this language in the 1967 Plan and submitted it for approval to its stockholders. Accordingly, the management of USI and the Executive Incentive Compensation Committee were not justified in amending the 1967 Plan in derogation of Paragraph 2 without obtaining shareholder approval. Gottlieb v. Heyden Chemical Corp., 33 Del. Ch. 82, 90 A.2d 660 (1952); Winkelman v. General Motors Corp., 44 F.Supp. 960 (S.D.N.Y. 1942), Waltzer at 9-11.

The defendants argue, however, that the language of section 8 of the 1968 Plan relating to prior outstanding options conclusively demonstrates that the plan contemplated the granting of options relating to the same stock covered by options previously granted provided that the later options could not be exercised until the expiration of the prior options and only with respect to unacquired stock subject to the prior options. The short answer to this is that section 8 merely addresses itself to the quite likely possibility that an individual could very well have options which had been granted on different dates and consequently the option prices would be different.

In such a case the section provides that the higher priced option is to be exercised first. This section says nothing whatsoever about the granting of consecutive options on the same shares to the same individual. If such was the intended result a cryptic manner was certainly chosen to achieve it. The Court feels that a more reasonable explanation for the language of section 8 is that it was intended to comply with one of the requirements needed in order to qualify the plan as a Qualified Stock Option Plan under the Internal Revenue Code (section 422) and thereby provide the option holders under the plan with the appropriate tax benefits.

In addition, the defendants suggest that the substance and effect of the action taken on January 16, 1970 constituted a grant of new option rights or new options to the optionees. They assert that "Vornado could just as well have implemented its decision to grant new options under the Plan by entering into entirely new option contracts not exercisable until the expiration of the original contract." Defendants' Memo. at 4. While what is meant by this is not totally clear, the Court takes it to be an assertion of the possibility that on January 16, 1970 the optionees and Vornado could

have agreed to terminate the existing 1963 options and then could have entered into new option agreements. The Court disagrees with the defendants' position that this alternative presented "purely a matter of form or mechanics-not one of substance." Defendants' Memo. at 4.

The infirmities of this procedure were pointed out by Judge Ryan in Waltzer as follows:

> The Internal Revenue Code of 1954 provides that a person must exercise all options granted to him at a higher price before he can exercise an option at a lower price. If an option is cancelled and another option issued at a lower price, the second option cannot be exercised until the first option would have expired. Waltzer at 11.

Consequently if on January 16, 1970 Vornado and the optionees had agreed to rescind the 1963 option agreements and enter into new ones at the lower price, these new options, as the defendants admit, could not have been exercised until the expiration of the original options. As a result between January 16, 1970 and the expiration dates of the higher priced options, Vornado's employees would have had no exercisable options and any employee leaving the Company during this period would have been deprived of all his options. Moreover, in order to achieve its objectives, Vornado "would have had to explain to each

optionee why he should agree to terminate his options" and this "would have entailed extended discussions." Waltzer at 11-12.

In view of the above, the Court finds that neither consecutive or "tandem" options or new options were contemplated by the plan as the defendants contend and that on the contrary the 1970 amendment was not countenanced by the plan. It therefore concludes that the amendment and the options granted pursuant to it are null and void.

As noted the plaintiff also claims that the 1968 proxy statement violated section 14 of the Securities Exchange Act of 1934 since there was no indication in that statement that the basis for setting the option price could be amended. The plaintiff further claims that the proxy statements for the years 1970 through 1972 inclusive were also violative of this section since the stockholders were not informed that the 1968 Plan did not permit the amendment. Finally the plaintiff contends that the defendants' activities in amending the 1968 Plan violated section 10(b) of the Act and Rule 10(b)(5) thereunder.

The very same claims were raised before and rejected by Judge Ryan in Waltzer. As to the 10(b) allegation Judge

Ryan wrote that "[t]he agreed facts and attachments which would constitute the evidence at trial do not show 'deceit, with[hoding] information or misstatement of material fact.' O'Neill v. Maytag, 339 F.2d 764, 767 (C.A. 2, 1964)". Waltzer at 13.

Similarly, here, there is no evidence that the defendants intentionally and knowingly violated the provisions of the 1968 Plan. As the Court stated in O'Neill v. Maytag, 339 F.2d 764, 767-68 (2d Cir. 1964), "where the duty allegedly breached is only the general duty existing among corporate officers, directors and shareholders, no cause of action is stated under Rule 10b-5 unless there is an allegation of facts amounting to deception."

Likewise, the Court finds no violation of section 14 of the Act. Each proxy statement for each of the shareholders meetings subsequent to January 16, 1970 disclosed the modification of the option contracts under the 1968 Plan, the price of exercise of the option and the method of computation and the period for exercise of the modified options. Further the proxy statement for the 1968 meeting in addition to explaining the elements of the plan adopted by the Board on April 16, 1968 set forth the complete plan as an exhibit to the proxy statement. In short, there was

no false or misleading statement in the proxy statements and accordingly no violation of section 14 of the Act. The fact that the statements subsequent to January 16, 1970 did not state that the amendment violated the 1963 Plan does not constitute a violation of section 14 of the Exchange Act. Laurenzano v. Einbender, 264 F.Supp. 356, 361 (E.D.N.Y. 1966).

C. CONCLUSION

The Court concludes that the January 16, 1970 amendment violated the 1963 plan and that the option agreements granted pursuant thereto are null and void. The Court further finds that there has been no violation of section 14 or 10(b) of the Securities Exchange Act of 1934.

Settle order on 3 days notice.

SO ORDERED.

Dated: New York, New York
January 16, 1974

LAWRENCE W. PIERCE
U. S. D. J.

JUDGMENT ENTERED JANUARY 30th, 1974

51a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICROFILM
JAN 30 1974

ESTHER JACOBY,

Plaintiff,

- v -

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROCOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendants.

JUDGMENT

72 Civ. 5441

U.S. DISTRICT COURT
FILED
JAN 30 1974
S.D. OF N.Y.

This action came on to be heard pursuant to a stipulation of facts entered into between the attorneys for all parties in this action who have appeared (the defendants Averell, Edwards and Gomes have not appeared) dated November 9, 1973, which contains an agreement that this action be adjudicated as if a trial were actually held and the facts and attachments constituted the evidence at the trial. The Court proceeded to determine the matter as if an actual trial had been held before it.

On January 16, 1974 this Court filed its opinion setting forth its findings and conclusions and directing settlement of a final order and judgment that the amendments to certain stock option agreements granted under the 1968 Stock Option Plan of Vornado, Inc. ("Vornado"), which amendments were dated and were the result of certain actions taken on January 16, 1970, were contrary to the provisions of the 1968 Plan and that, therefore, the amendments violated the Plan and are null and void.

The Court also found and concluded that the defendants did not violate Section 14 or Section 10(b) of the Securities Exchange Act of 1934.

IT IS ORDERED, ADJUDGED AND DECREED that:

1. The plaintiff have judgment against the defendants to the extent that the agreements entered into on or about January 16, 1970, between defendant, Vornado, and its officers and employees, which agreements amended prior option agreements granted under the 1968 Stock Option Plan of Vornado are adjudged not to have been contemplated and countenanced by that Plan and are, therefore, null and void; and it is further ordered that

2. The individual defendants shall account to Vornado for damages, if any, sustained by Vornado in connection with the aforesaid agreements of January 16, 1970 amending prior option agreements.

3. The defendants shall procure the cancellation of said amended option agreements but in no event shall the exercise of any options pursuant to said agreements be permitted hereafter. Such an accounting and/or report of cancellation of said agreements shall be filed by the defendants with the Court within sixty (60) days following the entry of this order and judgment; and it is further ordered that

4. Judgment be granted to defendants dismissing plaintiff's claim alleging violations by the defendants of Sections 10(b) and 14 of the Securities Exchange Act

of 1934; and it is further ordered that

5. Plaintiff's application for reasonable legal fees and disbursements for her counsel shall be set down by the Court for a hearing to be held on due notice to Vornado after the report or accounting hereinabove referred to in paragraph 3 has been made; and it is further ordered that

6. This Court reserves jurisdiction in this case and over the parties to it for the purpose of otherwise enforcing and indemnifying this final judgment.

Dated: New York, New York
January 28, 1974

LAWRENCE W. PIERCE
U. S. D. J.

JUDGMENT ENTERED JAN 30 1974

Raymond F. Burghardt
Clerk

AFFIDAVIT OF BERTRAM BRONZAFT SWORN TO MARCH 27, 1975 IN SUPPORT OF APPLICATION FOR FEES



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

ESTHER JACOBY,

Plaintiff,

-against-

72 Civ. 5442 (LWP)

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

AFFIDAVIT

Defendants.

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

BERTRAM BRONZAFT, being duly sworn, deposes and says:

That I am a partner in the law firm of Garwin & Bronzaft, attorneys for plaintiff Esther Jacoby in the above-captioned stockholders' derivative action and am fully familiar with the facts herein.

Deponent makes this affidavit in support of plaintiff's application for compensation to be awarded her attorneys and accountants for the substantial services they rendered in the successful prosecution of the above-captioned action.

Were this hearing on fees to be held before Judge Lawrence W. Pierce, who tried the matter upon stipulated facts, deponent merely would set forth a brief summary of the professional services rendered by plaintiff's attorneys and accountants

during the course of the action. However, as Judge Pierce has referred the matter of plaintiff's fee application to Magistrate Gerard L. Goettel for a hearing, deponent, in order to familiarize Magistrate Goettel with the substance of this novel derivative action, believes an expanded presentation to be in order.

## CHRONOLOGY

### Investigation Prior to Suit

My firm was retained in the fall of 1972 by Esther Jacoby, through her attorneys, to conduct an investigation into the activities of Vornado and its management. In order to conduct a thorough investigation of Vornado's activities, we immediately called upon Harry Rosner, a partner in David Berdon & Co., a certified public accounting firm with a national reputation in derivative and class action accounting, to assist us.

Prior to detailing the specific nature and purpose of the preliminary investigation undertaken in the Vornado matter, it is vital that the Court understand the importance of plaintiff's counsel's initial investigation in the derivative area. Because derivative and class actions are governed by unusually stringent rules as to the dismissal of actions, voluntary or otherwise, and as compensation to plaintiff's counsel is purely contingent, it is imperative that counsel institute only those actions which they believe to have an exceptionally strong likelihood of success. Thus, a thorough and painstaking search for all of the relevant facts and the governing

law is conducted prior to instituting a suit, in order that plaintiff and his counsel subsequently do not find themselves in a hopeless case from which it is difficult to extricate themselves.

Our Vornado investigation initially required a detailed and careful search of all accessible public material prepared and filed by Vornado or prepared by others relating to Vornado. Sources explored during our search included the following:

(a) Annual and interim reports, proxy statements and other communications sent by Vornado to its stockholders.

(b) Annual reports on Form 10-K and monthly reports on Form 8-K prepared by Vornado for the Securities and Exchange Commission and also filed with the New York Stock Exchange.

(c) Form 4 reports filed by directors and officers of Vornado with the SEC and the New York Stock Exchange pursuant to Section 16(a) of the Securities Exchange Act of 1934.

(d) Material contained in Standard & Poors' Corporate Records.

(e) Newspaper clippings, news releases and other data regarding Vornado contained in the files of Standard & Poors Corporation relating to the affairs of Vornado.

(f) Newspaper items contained in the Wall Street Journal, the New York Times and various financial magazines and publications.

(g) The daily market prices of Vornado 's common stock on the New York Stock Exchange for a period of years.

An analysis of the material obtained during the course of our investigation led both my partner, Sidney L. Garwin, a lawyer with thirty years of extensive experience in the derivative field, and me to conclude that a rather novel stockholders' derivative action in Vornado's behalf could and should be commenced.

The complaint that was filed on December 29, 1972, is a testimonial to the research that had been done and the number of drafts that had preceded it. Certainly, as will be seen, its accuracy and completeness was borne out by Judge Pierce's January 16, 1974 decision in plaintiff's favor.

The complaint alleges that the Board of Directors of Vornado, a Delaware corporation, whose common stock is traded on the New York Stock Exchange, adopted the Vornado 1968 Qualified Option Plan ("Plan"), on April 16, 1968.

A description of the Plan and a copy of the Plan were contained in Vornado's May 6, 1968 proxy statement which was forwarded to Vornado's stockholders in connection with Vornado's June 4, 1968 annual meeting. The Plan required stockholder approval in order to qualify as a qualified stock option plan udner the Internal Revenue Code of 1954. The stockholder approved the Plan at the annual meeting.

Pursuant to the terms of the Plan, Vornado was authorized

to issue options to purchase no more than 297,000 shares of Vornado's common stock.

During the period from July 1968 to and until January 15, 1970, Vornado granted optionees options to purchase 283,500 shares of Vornado's common stock at prices ranging from $23.00 to $25.07 per share.

On January 16, 1970, Vornado's Board of Directors, without prior stockholder approval, amended the option agreements outstanding under the Plan so as to permit the exercise of the options to purchase Vornado shares at price of $14.69 per share. The amendment provided, however, that the said options could only be exercised at $14.69 per share during the period after the expiration of the original option agreement and January 15, 1975.

The complaint alleged that the January 16, 1970 amendment was null and void because the 1968 Plan specifically provided that Vornado's Board of Directors was not permitted, without shareholder approval, to modify the option so that it would be exercised at a price less than the fair market value on the date it was granted, nor to modify said option to extend the period during which the option could be exercised to a period longer than five years.

It was further alleged that the January 16, 1970 options were null and void because there was no consideration for the modifications and that at least 50% of Vornado's Board of Directors were optionees-beneficiaries of the January 16, 1970 modifications.

The complaint alleges violation of Sections 10(b) and 14 of the Securities Exchange Act of 1934 ("Act") and SEC Rule 10(b)-5 promulgated under the Act and the common law.

Jurisdiction is predicated on Section 27 of the Act and diversity of citizenship.

The complaint sought to void the January 16, 1970 modifications, enjoin exercise of the options as modified and asked for an accounting of all profits realized by optionees whose options had been modified.

Deponent's office was aware from its research on Waltzer v. Billera, a stockholders' derivative action that we had brought on behalf of U.S. Industries, Inc. on very similar facts and law earlier in 1972, that modifications of option agreements had been undertaken by many United States corporations to resuscitate options where the market had dropped dramatically in price from the time the options had been granted. The Waltzer matter was then sub judice before Judge Ryan, on cross-motions for dismissal and summary judgment.

Many of the corporations that engaged in the modification, sought stockholder approval of the modification, whereas a number of companies such as USI and Vornado had determined not to bother going back to the shareholders, despite provisions in the plans to the contrary.

Interestingly, it should be noted that in doing our initial research for a possible Vornado action, we determined to explore the possibility that the January 1970 amendment of the option agreements was violative of the Internal Revenue Code which had not been alleged in our Waltzer complaint. However,

many hours of research later, we concluded that the Internal Revenue Code was the one relevant statute that the defendants had not breached by their acts.

There was no question in our minds that in order for plaintiff to suceed in the prosecution of the action, counsel would literally have 'to make law", as no Court had ever ruled on the legal propriety of the modiciations of the type undertaken by Vornado, without prior shareholder approval.

Soon after the filing of the complaint, the United States Marshal was able to effectuate process on the following defendants: Solomon Rogoff - January 3, 1973; Stanley Simon - January 2, 1973; Horace R. Zimmerman - January 3, 1973; Frederick Zissu - January 3, 1973 and Vornado, Inc. January 3, 1973.

Vincenti & Schickler, Esqs., attorneys with offices at 225 Broadway, New York, New York, filed a notice of appearance for all of the above defendants on January 22, 1973, and has remained counsel to said defendants to date. On February 8, 1973, the same law firm filed a notice of appearance for defendant Alvin C. Martin, who had been served with process in early February and has similarly represented Mr. Martin throughout the course of this litigation.

After requesting and obtaining three stipulations extending defendants' time to move or answer, each of the defendants in the action joined in a motion on or March 12, 1973 for an order pursuant to Rule 12(b) and 56 of the F.R.C.P. dismissing the complaint on the ground that it fails to state a

claim upon which relief may be granted; and in the alternative, granting summary judgment for the defendants herein.

However, prior thereto in mid-February, deponent had reviewed the Jacoby file such as it was at the time and had determined that plaintiff would require certain material from the defendants in order to move forward with the prosecution of the action. In that regard, deponent drafted, served and filed a notice to produce upon the defendants which sought documentation contained within the files of the defendants relating to the subject matter of the action. Included among the Rule 34 requests made by plaintiff, was one for a copy of the 1968 Qualified Stock Option Plan; and for minutes of all Board of Directors meeting of Vornado and committees thereof, which related to the adoption and interpretation and grant of options under the 1968 Plan and the amendment in January 1970 of the option agreements entered into under the 1968 Plan.

On or about March 9, 1973, Vincenti & Schickler, Esqs. attorneys for the defendants became aware of the heretofore mentioned Waltzer v. Billera action (USI), 72 Civ. 2052 (SJR) and wrote to Raymond Sexton, the Coordinating Clerk, asking that Jacoby v. Averell and Waltzer v. Billera, be treated as related cases under Calendar Rule 13. In said March 9th letter, Mr. Vincenti pointed out the striking similarities between the two actions:

> "A comparison of the complaints demonstrates that the allegations contained in each of them are almost identical. In each action, the plaintiff sues publicly held corporations and their respec-

> tive directors for allegedly illegal actions in connection with 'qualified' stock option plans adopted by the respective corporations. In each action, the respective corporations, in the late 1960's, had issued five-year stock options to key employees at prices equal to the fair market value of the stock under the plans. Thereafter, in 1970 when the price of the stock of each corporation had declined substantially below the prior stock option prices, the respective corporations issued new five-year options at the lower 1970 fair market value, to the same persons who held the prior options. But, the new options could not be exercised until the expiration of the original options and, then, only to the extent the prior options had not been exercised. Such new options are commonly referred to among tax lawyers as 'tandem consecutive qualified options.'
>
> In each action, the broad legal question is whether the issuance by the respective corporations of the new tandem consecutive options was proper."

Mr. Vincenti urged that the matter be transferred to Judge Ryan, who already had pending before him in Waltzer, a trial of the action, predicated upon stipulated facts. Judge Ryan apparently refused to accept jurisdiction of the Jacoby matter and it remained within Judge Pierce's jurisdiction.

Deponent brings the March 9th letter to the Magistrate's attention solely for the purpose of demonstrating that as early as March 9, 1973, counsel for the defendants had not only realized the striking similarities at all levels between Waltzer and Jacoby, but had sought to use said similarities to have the case determined by the same Judge.

Returning to defendants' March 12th notice of motion, it was accompanied by a Rule 9(g) statement and a 27 page affidavit sworn to on March 9, 1973, by defendant Alvin C. Martin, who is a

Senior Vice President, Secretary and Director of Vornado.

The notice of motion was also supported by a 9 page affidavit of defendant, Stanley Simon, a director of Vornado, which was also sworn to on March 9, 1973. In support of their motion to dismiss, counsel for defendants submitted an extensive, well-developed 47 page memorandum of law.

It goes without saying that upon receipt of defendants papers, deponent and his partner both carefully studied the papers and deponent went to the library in order to review certain of the case material contained therein.

For the next three months, counsel stipulated extensions of time on defendants' motion to dismiss and plaintiff's notice to produce. In June of 1973, Judge Pierce brought counsel in for pre-trial hearings. At the first of said hearings on June 14, 1973, Mr. Vincenti indicated that he had become aware of Judge Ryan's May 23, 1973 Decision in the Waltzer case. In the Decision, Judge Ryan held that although the individual defendants therein had not violated the Securities Exchange Act of 1934 as had been alleged by plaintiff in his complaint, they had violated their fiduciary duties to the corporation by amending USI's 1967 Stock Option Plan as to price and duration, without first obtaining stockholder approval as required by the Plan.

Judge Ryan declared the July 16, 1970 amendments to the existing option agreements null and void and in the final judgment filed in the action, required the defendants to make an accounting for any damages and account for the cancellation of the options.

With that decision in hand, defendants' counsel having

long appreciated the striking similarity between the two actions sought to have a consent decree entered in Jacoby whereby the 1970 amendments to the existing stock options were deemed null and void on the ground that they were not countenanced by the Plan adopted on April 16, 1968; that the plaintiff execute and deliver releases to the defendants releasing them from all claims that were set forth or might have been set forth in the complaint and the Court to retain jurisdiction solely with respect to the question as to plaintiff's right to recover fees and disbursements for the prosecution of this action.

Unfortunately, the consent decree insisted on by defendants' counsel did not satisfy the requirements of Rule 23 and although there were extended discussions at three pre-trial conferences held before Judge Pierce, it was ultimately determined that the matter would be resolved in precisely the same manner by which Judge Ryan had decided the Waltzer matter.

Thus, at the third pretrial conference held before Judge Pierce on June 27th, it was agreed that counsel would work on a Stipulation of Facts in preparation of the Court trying the matter on that basis later in the year. It should be noted that counsel in the Waltzer matter agreed that the matter be heard by Judge Ryan upon Stipulated Facts, as if the matter had actually been tried before him and the evidence introduced placed in evidence at such trial. Defendants' counsel at the three hearings before Judge Pierce, made much of the necessity of coming to a rapid determination in the matter so as not to keep the Vornado optionees in a state of flux and unhappiness, which counsel claimed plaintiff's lawsuit had engendered.

Deponent on June 28, 1973, forwarded to defendants' counsel a copy of the Stipulation of Facts which deponent's office had used in the Waltzer matter so that defendants' counsel would have a useful guide drafting said facts in the Jacoby matter.

Deponent also requested that the documents sought in Plaintiff's February 22, 1973 Notice to Produce, be made available to us so that we could begin working on plaintiff's draft of the Stipulation of Facts.

Deponent was unable to obtain the documents requested until after defendant had sent his proposed draft of Stipulated Facts to us for review on August 17, 1973. Upon return from vacation in September and through October and November, deponent and defendants' counsel engaged in a good deal of drafting and redrafting of the proposed Stipulation of Facts. At least two conferences were held at defendants' counsel's office in an endeavor to modify the demands of both sides as to what facts and in what form should said facts be included in the Stipulation. Both counsel sought to be protective of their interests and yet make full presentation with supporting exhibits (attachments) so that the Court would have a clear perception of factual aspects of the case.

Late in the process, a mutually agreed upon Stipulation of Facts was signed by counsel on November 12, 1973 and said Stipulation together with the numerous appended and unappended attachments were filed with the Court.

Defendants' counsel continued to underscore, by letter, the urgency they attached to the Court making a rapid decision in the plaintiff's lawsuit. Counsel continued to urge the Court to decide the case as promptly as possible since they believed that the morale of the many employee-optionees had been adversely affected because of the unsettled status of the options in question.

So that there be no question as to the tact that defendants took in their December 3, 1973 memorandum, deponent respectfully requests that the Court scan the fifty-four page memorandum. Defendants concede nothing, litigate every single point with an eye to dismissal of the action and argued strenuously that the January 16, 1970 amendments did not violate Delaware law, §10(b) of the Act, Rule 10(b)-5 or §14 of the Act.

As to that cas sometime on all fours with Jacoby, Waltzer v. Billera, defendants found it distinguishable, thusly:

> "The opinion of this Court in Waltzer v. Billera (U.S. Industries, Inc.) C.C.H. Fed. Sec. L. Rep. ¶94,011, S.D.N.Y., May 23, 1972, per Judge Sylvester J. Ryan, holding that a similar type action taken by the corporation in that case was violative of the plan of that corporation (but not of any provision of the Securities Exchange Act of 1934) and was technically a violation of the common law relating to corporate fiduciary obligations, did not deal with a provision such as is set forth in Paragraph 8 in the plan in the instant action. The plan in the U.S.I. case did not contain such a provision expressly permitting tandem options. It is submitted that on this basis alone, the U.S.I. case is clearly distinguishable from the instant action, and the decision there has no application. Judge Ryan's decision went squarely and solely on his interpretation of the provisions

> of the U.S.I. plan, and that plan contained no provisions for the granting of tandem options relating to stock subject to options already outstanding, as does the Vornado Plan in Paragraph 8, quoted above.. . . . ."
>
> (Emphasis supplied)

Plaintiff's December 7, 1973 brief, fifty-three pages in length, relied heavily on Judge Ryan's decision in Waltzer but was, in deponent's opinion, a well-thought out, comprehensive brief supporting plaintiff's position on all of the relevant law. Deponent, and to a lesser extent, Sidney L. Garwin, spent a great deal of time in its preparation.

Defendants' counsel wrote at least two more letters to the Court urging the Court to resolve the matter promptly in order to cure the morale problem that had risen among the optionees under the Plan and in order to meet the January 27, 1974 date promulgated by the U.S. Cost of Living Council for the granting of additional options by Vornado.

Defendants' eloquent pleas to the Court for promptness of resolution were glaringly inconsistent with a fifty-four page brief disowning Waltzer, which had apparently been applicable as far back as March 1973 and certainly as of June 1973.

However, only eighteen days later on December 21, 1973, Waltzer returned to favor with the defendants and defendants' counsel wrote to Judge Pierce as follows:

> "Because of these exigencies, the corporation is prepared to accept a decision by your Honor based upon the ruling in Waltzer v. Billera (USI)C.C.H. Fed. Sec. L. Rep. ¶ 94,011, S.D.N.Y. May 23, 1972, per Judge Ryan, that the act of the corporation in January 1970 was a technical violation of the corporation's 1968 stock option plan and therefore,

> technically, in violation of the State law of Delaware. Of course, we emphasize that this is in no way a concession by the defendants that there has been any violation of any of the statutes or regulations under the Securities Exchange Act of 1934...."

Although we well understand defendants' reasons for flip-flopping in an attempt to reach a rapid decision, deponent wants it made clear for purposes of this application, that defendants sharply contested the action before Judge Pierce and he treated the litigation as such.

On January 16, 1974, Judge Pierce in a lengthy decision, found that the January 16, 1970 amendment violated Vornado's 1968 Qualified Stock Option Plan and that the option agreements entered into pursuant thereto were null and void. The Court found, however, that the acts complained of did not violate §10b or 10(b)-5 promulgated thereunder or §14 of the Act. In essence, Judge Pierce found that the case was, in fact, on all fours with the recent decision of Judge Ryan in Waltzer v. Billera.

Judge Pierce stated that he found Judge Ryan's opinion persuasive and that he would "adopt his reasoning here". Throughout the decision, Judge Pierce relies on the Waltzer decision to negate the substance of the arguments by Vornado defendants in order to escape liability in this action.

The substance of Judge Pierce's decision was precisely that of Judge Ryan in the Waltzer matter.

Both sides filed order and judgments as they could not agree on the wording of an order and judgment satisfactory to both. Neither side's order and judgment was signed by the

Court and the Court prepared its own and granted judgment against the defendants to the extent of voiding each of the January 16, 1970 amendments to the option agreements which had been granted under the 1968 Plan. It was further ordered that the individual defendants account to Vornado for any damages sustained by Vornado, if any; that the defendants procure the cancellation of said option agreements but in no event should the exercise of said options be permitted thereafter; that Vornado account or report to the Court within 60 days as to the cancellation of said agreements; that plaintiff's claim under §14 and 10(b) of the Act be dismissed and that plaintiff's application for reasonable legal fees and disbursements shall be set down for a hearing by the Court subsequent to the accounting made herein.

Subsequently on March 27, the defendants filed an extensive accounting with the Court which detailed the fate of the optionees who received amended options on or about January 16, 1970. Defendants supplied a schedule of all persons who entered into the aforementioned option agreements, received any rights thereunder, and the number of shares that such optionee received under the amended option agreement. The schedule also contained the date of termination of any optionee who had left the employ of Vornado and the date these optionees released their rights under the Option Agreement. Schedule B in the accounting, consisted of copies of the acknowledgments signed by those optionees who were still in Vornado's employ. Plaintiff and his accountants spent some time in reviewing the accounting reports and found certain discrepancies with the figures set forth therein and certain published material and figures that had been used

by the parties in their Stipulation of Facts.

Deponent wrote to defendants' counsel in April 1974 pointing out the discrepancies and not finding the initial answer responsive, wrote a second time on May 13th seeking specific explanations vis-a-vis apparent discrepancies, Two months later, the defendants filed an exhaustive report and explained the discrepancies in such a manner as to be basically in line with the figures that had been used in the Stipulation of Facts. With that, plaintiff's attorneys and accountants felt satisfied that the computation supplied initially, taken with the additional material supplied July 16, 1974, effectively ended the accounting phase of this lawsuit.

There is no question that both sides agreed that options of 168,000 shares were voided as a direct consequence of the Court's determination in plaintiff's favor. The Court, in late November, 1974, at a hearing, referred the remaining open issue to Magistrate Goettel for a hearing on plaintiff's application for fees. Initially scheduled for February 28, 1975 the hearing was adjourned due to the illness of deponent's partner which caused a serious time problem in deponent's office earlier this year.

Deponent has seen fit to interrelate the Waltzer action and the Jacoby action because of their obvious similarities, Judge Pierce's finding that they were very similar, defendants constant statements that the two cases were extraordinarily alike, which, incidentally, did not end with Judge Pierce's January 16, 1974 decision.

In a relatively recent telephone conversation with Vito Vincenti, defendants' counsel herein, deponent was asked if we were 'serious' in going forward with this fee application in

light of Judge Ryan's January 16, 1975 decision which denied plaintiff's application for a fee of $62,500 plus out-of-pocket expenses in the Waltzer case.

Judge Ryan's basis for refusing to grant Garwin & Bronzaft any fees was predicated on his belief that no benefits had accrued to the USI as a result of plaintiff's lawsuit. (See Judge Ryan's January 16, 1975 memorandum appended hereto as Ex. "A" and made a part hereof.)

For deponent to state that we were astounded and dismayed at Judge Ryan's decision, would be to understate our reaction. From our point of view, the reasoning set forth in the decision was, if possible, more distressing than the Judge's decision denying Garwin & Bronzaft any fees.

Had the United States Court of Appeals for the Second Circuit not approved a settlement of an appeal from Judge Ryan's order, as deponent will forthwith describe, we have no doubt that our Appeal would have been successful. The case law overwhelmingly supports our position that Waltzer conferred a substantial benefit upon USI entitling counsel to legal fees.

Mr. Vincenti indicated that since both cases were almost identical in the results accomplished (Waltzer resulted in the cancellation of 190,845 options), he could not perceive how deponent's firm could make a serious fee application in this action with Judge Ryan's decision/order staring us in the face. Mr. Vincenti obviously was not aware of the fact that plaintiff had filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit on February 11, 1975, and was preparing to file the

record in the Court of Appeals, when all counsel in the Waltzer action was called in for a pre-trial conference on February 24, 1975, by Nathaniel Fensterstock, Staff Counsel to that Court.

Mr. Fensterstock used his good offices at that conference to negotiate an agreement whereby USI would agree to pay Garwin & Bronzaft $42,000 in legal fees in return for plaintiff's agreement to dismiss the appeal.

Defendants' counsel required and received Mr. Fensterstock's word that the stipulation wherein Garwin & Bronzaft would receive the $42,000 in legal fees would be 'so ordered' or approved by a Judge of the Second Circuit.

Ultimately, two separate stipulations were submitted to the Second Circuit for approval.

The first Stipulation (Ex. "B" hereto) was the March 10, 1975 stipulation whereby USI agreed to pay Garwin & Bronzaft $42,000 in full settlement of the legal fees and disbursements at issue in the appeal and all parties agreed that a second stipulation, also dated March 10, 1975, wherein the parties agreed that the appeal be dismissed without costs, would be filed with the Court (Exhibit "C" hereto).

So that there be no misunderstanding that the Court's approval of the stipulation granting Garwin & Bronzaft $42,000 in legal fees in settlement of the appeal from Judge Ryan's order, was required before the parties would agree to the dismissal of the appeal, deponent has attached the covering letter of D. Robert Owen, Esq., dated March 11, 1975, which accompanied the two executed Stipulations to Mr. Fensterstock (Ex. "D" hereto).

On March 13, 1975, Chief Judge Irving B. Kaufman entered an order approving the stipulations resolving the appeal, in accordance with the terms of the Stipulations (Ex. "E" hereto).

A photostat of USI's check No. 3996 dated March 19, 1975, in the amount of $42,000 is, of course, the final word in the Waltzer matter (Ex. "F" hereto).

Clearly, the defendants believed that Judge Ryan's January 16, 1975 decision in Waltzer insulated Vornado from paying any legal fees to plaintiff's counsel notwithstanding Judge Pierce's January 16, 1974 decision on plaintiff's behalf. Although deponent was never able to understand the basis of such a belief by Mr. Vincenti, in light of the number of decisions which have awarded plaintiffs' counsel fees in cases where the benefits accrued to the corporation by the plaintiff's actions were not cash. (See plaintiff's memorandum submitted herewith for a full discussion of such cases.)

However, Waltzer has failed the defendants in Jacoby for a second time. Patently, Chief Judge Kaufman of the Second Circuit was aware that he was approving a settlement of an appeal, whereby the District Court had refused to award a single cent of a $62,500 requested legal fee in a derivative action. Since Chief Judge Kaufman saw fit to approve the payment of $42,000 in legal fees in an action where Courts approval of legal fees awarded plaintiff's counsel is mandated, he had to, by definition, have found that plaintiff's counsel had, in fact, conferred substantial benefits on USI.

Given the almost identical benefits conferred by plaintiff's counsel in the Jacoby action, one cannot perceive how this Court can support defendants' position that no benefits have been

conferred on Vornado and ergo, no fees should be awarded plaintiff's counsel.

Rather, deponent believes that the Court will once again look to Waltzer, as it did for liability; for the accounting; and now to the Second Circuit's approval of $42,000 in legal fees in determining that substantial fees should be awarded plaintiff's counsel in this action.

BENEFITS ACHIEVED

Deponent cannot, as he has done in a number of fee applications in derivative actions, point to a pecuniary benefit that the successful prosecution or settlement of a suit has bestowed on a nominal corporate defendant.

This is not possible in Jacoby because the successful outcome of the lawsuit did not result in dollars flowing into the Vornado corporate treasury. However, as we have set forth in the accompanying memorandum of law, there have been a number of derivative actions wherein Courts have awarded substantial fees to plaintiff's counsel although no cash or tangible benefits accrued to the corporation.

Put simply, the voiding of the 168,000 options was in itself, the benefit that the plaintiff's lawsuit conferred upon Vornado. The voiding of the options, the correcting of the fiduciaries' wrongs, have entitled plaintiff's counsel to come before this Court, under a theory of law that long has been recognized in this country, and which has most recently been expounded by the Supreme Court of the United States in the celebrated Mills v. The Electric Auto-Lite Company, 396 U.S. 375 (1970).

Mills held that plaintiff's counsel in derivative actions are entitled to legal fees when the suit results in a substantial benefit albeit non-pecuniary, when the benefit conferred upon the corporation is one:

> "....that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest."

The Mills Court was quoting from Bosch v. Meeker Cooperative Light & Power Assn., 257 Minn. 362, 101 N.W. 2d 423 (1960) and cited Bosch which it considered a leading case in support of its legal position. The Bosch court awarded plaintiff his legal fees for obtaining a judicial determination that invalidated the election of certain of the corporation's directors.

The voiding of the amendments to some 168,000 options because defendants sought to reduce the grant price and extend the time within which said options could be exercised, in direct contravention of the terms of a Plan approved by the Vornado shareholders, without their approval, places Jacoby directly under the holdings of Mills and Bosch for benefit and fee purposes.

The type of non-cash benefits that courts have based awards of counsel fees on, are varied and will be further explored in far greater detail in plaintiff's accompanying memorandum of law. Suffice it to say, that our adversaries throughout this litigation have taken an unusual tact. They have denied in their papers and informally, that plaintiff's counsel and accountants have conferred any benefits on Vornado. Vincenti & Schickler, in their December 21, 1973 letter to the Court explicitly stated

that plaintiff's counsel should not be granted fees or expenses.

At page 2 thereof, Mr. Vincenti stated:

> "Moreover, we stress that the defendants' statement as to their willingness to accept such a decision is not made with any intent to waive any of their rights concerning the question of counsel fees or other litigation expenses being awarded to the plaintiff herein. It is our position that plaintiff is not entitled under all of the circumstances herein to any of such fees and expenses and we request that this question be referred to a referee or magistrate for determination after the Court's determination of the substance of this matter." (Emphasis supplied)

One hardly can remember when individual defendants wanted to compensate plaintiff's counsel who were in the process of successfully prosecuting a derivative action against them.

Another unique concept raised throughout this litigation by defendants' counsel is their apparent belief that a corporate wrong which does not constitute a violation of a federal securities statute is of almost no consequence, whereas if the same wrong were to constitute a securities act violation, it would be of a far more serious nature. Mr. Vincenti, for example, has suggested in conversation with deponent, that Mills has no application to Jacoby because the Jacoby defendants violated their fiduciary duties to the corporation and not the Securities Exchange Act of 1934. This line of reasoning escapes deponent.

The problems which have been faced by the Vornado optionees as a result of the illegal amendments were created by defendants' illegal acts and not by plaintiff's lawsuit. Plain-

tiff, as a Vornado stockholder, brought her action to clear up these wrongs. The fact that there may have been a morale problem and uncertainty among Vornado's employee-optionees from the commencement of this lawsuit up and until Judge Pierce's January 16, 1974 decision, was created by the illegal acts of the Vornado defendants and it was plaintiff's lawsuit which brought finality and legitimacy to the situation with the issuance of Judge's Pierce decision.

TIME SPENT

Another factor considered in the awarding of plaintiff's legal fees in a derivative action, is the time expended. Deponent in recounting the time spent in the prosecution of Jacoby must, of course, take into consideration the time spent earlier in Waltzer, which could be directly applied to Jacoby.

Whereas Garwin & Bronzaft and David Berdon & Co., spent in excess of 700 hours in the prosecution of the Waltzer matter, our ability at times to draw on our waltzer efforts and experience considerably reduced our reconstructed hours in the Jacoby action. The firm of Garwin & Bronzaft thus expended 273 hours of partners' time in the preparation and successful prosecution of this action. This does not include any time spent on plaintiff's fee application nor half of a considerable number of hours charged to Waltzer but which correctly should have been charged to Jacoby.

Mr. Harry Rosner of David Berdon & Co., indicated to me that he spent an amount of 55 hours in the prosecution of this lawsuit.

PREVIOUS EXPERIENCE

It has been said that the fees in derivative litigation should vary in amount with the talents and experience of the applicant. In determining the fairness of deponent's proposed fee, the Court must necessarily take into account the ability, experience and the particular knowledge in this highly specialized field of corporation actions,of the attorneys who performed the services. It is, therefore, appropriate that we furnish an abbreviated statement of our qualifications with particular stress upon derivative actions.

The firm of Garwin & Bronzaft has extensive experience in corporate matters of all types, and particularly, derivative and representative stockholders' actions. In recent years, we have actively participated in such actions in New York, Delaware, Michigan, Florida, Washington, Connecticut, Texas, Wisconsin and Massachusetts.

A number of cases in which Bertram Bronzaft, Garwin & Bronzaft, or its predecessor, Sidney L. Garwin, have been either general or trial counsel, involving the successful prosecution of derivative actions, may perhaps furnish a better guide to our experience in litigation of this type:

| Title of Action | Approximate Amount of Recovery |
|---|---|
| Coran v. Newcombe (National General Corp.) | $1,300,000 |
| Duman v. Clinton (Clinton Oil Corporation) | 2,000,000 |
| Kasdan v. Murphy (Reed Tool Corp.) | 5,000,000 |

| Title of Action | Approximate Amount of Recovery |
|---|---|
| Lewis v. Levy (LTV) | $410,000 |
| Schein v. Bound (Harcourt, Brace & Jovanovich) | 273,000 |
| Makofsky v. Burgess (Alaska Insterstate) | 360,000 |
| Saminsky v. Gould (Boston Fund) | 600,000 |
| Garwin v. Edwards (Ogden Corporation) | 250,000 |
| Sherman v. Welling (First Republic Corp.) | 1,000,000 |
| Scheer v. Wyly (University Computing) | 500,000 |
| Stern v. Reiner (Exquisite Form) | 1,000,000 |
| Bernstein v. Kenelly Heath Tecna) | 400,000 |
| Goldman v. Shahmoon (Shahmoon Industries) | 850,000 |
| Miller v. Chaplicki (National Tea) | 2,400,000 |
| Selman v. Colburn (RKO Theatres) | 1,200,000 |
| Levy v. Babb (Metropolitan Playhouse) | 1,000,000 |

As the summary reveals, we have been general or trial counsel in derivative suits which have resulted in millions of dollars in recovery by corporations in the past years.

EXPENSES OF LITIGATION

Counsel for the plaintiffs have incurred some out-of-pocket disbursements for the photostating, filing fees, marshal's

Affidavit of Bertram Bronzaft sworn to March 27, 1974 in support of application for fees

fees, etc., in a total amount aggregating $211.44.

Not included in these out-of-pocket expenses is the very substantial item of office overhead attributable to the investigation, preparation and prosecution of this litigation. While it is not possible to ascertain exactly what proportion of such overhead is properly referable to this suit, this Court on the basis of the records, may reasonable infer that such expenses are considerable.

SUMMARY

This action has resulted in the voiding of 168,000 options to purchase shares of the common stock of Vornado, Inc. which were illegally granted by the defendants in January of 1970. Deponent's firm achieved this result after a trial of the matter upon stipulated facts. The matter was sharply contested in the memoranda submitted to Judge Pierce and defendants made every conceivable argument in an attempt to succeed. Any suggestion that they voluntarily acquiesced to the Waltzer decision is rebutted by defendants' December 3, 1973 brief and Judge Pierce's January 16, 1974 decision.

Plaintiff, in winning, succeeded in a theory that this office expounded for the first time in the Waltzer action. This was not a victory predicated on an earlier Securities Exchange Commission action or another counsel's theorizing, but rather, on our own ingenuity and legal inventiveness. The uniqueness of our successes in Jacoby and Waltzer, was borne out by an article in the February 1975 issue of Dun's Review entitled "New Life for Underwater Options" which cites the

USI and Vornado cases as the two cases in recent years where corporate attempts to resuscitate employee stock options had been determined by the Courts to be illegal and nullified. (Page 39 of said article is appended hereto as Ex. "G".)

The Court is aware that plaintiff's counsel represented plaintiff on a contingent basis. Had we failed in prosecuting this de novo cause of action, all of the time expended would have gone without recompense, not to speak of the huge overhead which similarly would have gone unpaid. Ironically, our adversary, who is able, experienced and sometimes difficult, has unquestionably been compensated handsomely on an hourly basis for not quite winning the case. The moral of defendants' position is that defendants' counsel is entitled to be paid on a straight time basis for losing, but plaintiff's counsel can succeed on a de novo cause of action while working on a contingency arrangement, and not be entitled to a single dollar in legal fees. Deponent prefers the $42,000 moral in Waltzer which check, appended hereto as Ex. "F", demonstrates plaintiff's counsel's right to significant legal fees in this almost identical action.

As deponent has made rather clear, Mr. Vincenti and deponent have had a number of differencies of opinion, some serious, throughout the course of the litigation, including a strong difference on the issue before the Magistrate. However, before closing this affidavit, I must state for the record that he is a tough, but fair litigator, whose memoranda stand up rather well on a second, detached reading.

Affidavit of Bertram Bronzaft sworn to
March 27, 1974 in support of application for fees

Garwin & Bronzaft's victory in this lawsuit in voiding the January 1970 amendments to Vornado's 1968 Option Plan; the unique de novo concept of law developed by Garwin & Bronzaft upon which the action was won; the considera le time and effort expended by plaintiff's attorneys in the preparation and prosecution of the action, the contingency nature of the fee and the competence and expertise of defendants' counsel, are all factors which warrant this Court awarding a fee of Forty Thousand ($40,000) Dollars plus $211.44 in out-of-pocket disbursements incurred.

Deponent respectfully requests that plaintiff's application for fees be granted in the sum of Forty Thousand ($40,000) together with $211.44, for out-of-pocket disbursements.

Bertram Bronzaft

Sworn to before me this
27th day of March, 1975.

Notary Public
Qualified in Nassau County
Commission Expires March 30, 1976

JACK WALTZER v. I. JOHN BILLERA, et al.

Endorsement
72 Civ. 2052

The attorney for the nominal plaintiff herein, an individual stockholder who sued derivatively on behalf of U. S. INDUSTRIES, INC. (hereafter USI), has applied for an allowance of $62,500.00 for legal and accounting services rendered and for disbursements of $307.12 to be paid by the corporate defendant USI. Apparently, counsel for the defendants do not oppose the motion, the granting of which is subject to the approval of the Court.

This application is denied principally because it does not appear from the accounting which has been filed by the defendants pursuant to the judgment of this Court that the corporate defendant has been substantially benefited as a result of plaintiff's counsel's efforts or that the individual defendants were enriched as a result of the acts complained of.

The suit filed on May 12, 1972 alleged violations of Sections 10(b) and 14 of the Securities Exchange Act of 1934 and of common law fiduciary duty by the Board of Directors of USI. Both sides moved for summary judgment and, upon stipulated facts, the Court granted summary judgment for defendants, dismissing the alleged violations of the Securities Act, and judgment for plaintiff on the common law theory of breach of fiduciary duty.

It was claimed by plaintiff and I found that the Board of Directors had breached the terms of a qualified stock option plan adopted by the stockholders in 1967, by permitting the appointed Committee to amend the Plan in 1970 so as to extend the life of the options and to change their purchase price without stockholders' approval, a technical violation, at its worst. I found, however, that the law was not free of doubt and I certified the matter for intermediate appeal.

The judgment entered on consent directed that the "individual defendants shall account to USI for damages sustained by USI in connection with the aforesaid agreements of July 16, 1970..... if any, and in the alternative said defendants may procure the cancellation of said agreements but in no event shall the exercise of any options pursuant to said agreements be permitted hereafter." It also provided that thereafter USI would pay to counsel a reasonable allowance for fees and disbursements in such amount and payments as the Court may hereafter set "after the accounting ordered.....had been made."1/

The accounting filed by the Senior Vice President and General Counsel of USI shows the following:

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1/ The judgment recited that the parties stipulated that they would not pursue an intermediate appeal.

MICROFILM
JAN 17 1973

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Of the total additional 363,666 shares covered by the additional option rights granted by the 1970 Amendment:

(a) 153,898 were terminated by the death or departure of optionees from UST;

(b) 14,850 shares expired because the original option rights had been exercised;

(c) 190,845 shares were cancelled by letter agreement dated May 24, 1973 following my decision;

(d) 3,473 shares representing rights held by 7 holders have been cancelled by UST, who will not permit the options to be exercised;[2]

(e) 600 shares were purchased by one optionee - not an officer or director defendant - prior to my decision at the price of $12 per share when the market was $17.6875 at a profit to the optionee of about $3,000.

While it may seem inequitable to deny counsel fees in view of the services performed, counsel was well aware that the outcome of the case was highly doubtful. He acknowledges that many corporations had acted in similar fashion, that he took the case on a contingency at the behest of one stockholder whose holdings are undisclosed, and that there may be difficulty in determing the precise amount of the benefits derived by UST. Certainly, no accountant's services were needed to determine whether as a matter of law the defendant could amend its option plan, the only theory on which plaintiff prevailed. Assuming that these services were necessary to evaluate the Securities violations, these claims were dismissed.

While it is not necessary to show the creation of a cash fund as a result of counsel's efforts from which the fee might be paid, it is absolutely necessary to find that some substantial benefit has been conferred on the corporate defendant that is paying the fee. "A substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." Bosch v. Meeker Cooperative Light & Power Assn, 257 Minn. 362, quoted by the Supreme Court in Mills, et al. v. Electric Auto-Lite Co., et al. 396 U.S. 375, at page 396. Wechsler v. Southeastern Properties, Inc., #74-1596, 74-1655, C.A. 2, November 4, 1974.

The invalidation of the amendments to the stock option agreements by this Court's decision, while perhaps salutary as a deterrent to similar future actions, has resulted in a supposed benefit of so uncertain a nature as to preclude compensation by the corporation. Schechtman v. Wolfson, 244 F. 2d 537 (C.A.2, 1957).

The motion is denied; so ordered.

Dated: January 16, 1975.

U.S.D.J.

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[2] It is ironic to note that the market value of the stock of UST has declined steadily since the filing of this Court's decision so that the option price of $12, the market value in 1970, if exercised now, would represent a gain to the corporate defendant.

Exhibit B to Bronzaft affidavit

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - - x

JACK WALTZER,

Appellant,

-against-

I. JOHN BILLERA, et al.,

Appellees.

- - - - - - - - - - - - - - - - - - - - x

Civil Appeal
Docket No. 75-7112

STIPULATION

The parties having agreed to compromise their differences with respect to the Order of the Honorable Sylvester J. Ryan of the United States District Court of the Southern District of New York, entered on January 16, 1975, denying counsel fees to the attorneys for the appellant herein, which denial is the subject matter of this appeal, and after a pre-argument conference held in the United States Court of Appeals for the Second Circuit on February 24, 1975, and the parties, simultaneously with this Stipulation, having entered into a Stipulation that such appeal be dismissed;

IT IS HEREBY STIPULATED by and among the parties hereto that, upon approval of this Stipulation by this Court or a judge thereof, appellee, U. S. Industries, Inc., shall within ten (10) days of such approval, pay to Garvin & Bronzaft, attorneys for the appellant herein, the sum of $42,000 in full settlement of the attorneys' fees and disbursements which are at issue on this appeal, and that the Stipulation agreed to by the undersigned dismissing this appeal shall be filed with this Court.

Approval of this Stipulation may be entered without further notice to any party.

Dated: New York, New York
March 10, 1975

GARWIN & BRONZAFT

By: _____
A Member of the Firm
Attorneys for Appellant
1501 Broadway
New York, New York 10036
(212) 244-5050

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

By: _____
A Member of the Firm
Attorneys for Appellee
U. S. Industries, Inc.
299 Park Avenue
New York, New York 10017
(212) 688-0400

PATTERSON, BELKNAP & WEBB

By: _____
A Member of the Firm
Attorneys for Individual Appellees
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- - - - - - - - - - - - - - - - - - - - x

JACK WALTZER,

Appellant,

-against-

I. JOHN BILLERA, et al.,

Appellees.

- - - - - - - - - - - - - - - - - - - - x

Civil Appeal
Docket No. 75-7112

STIPULATION

IT IS HEREBY STIPULATED by and among the parties that the above appeal may be dismissed with prejudice and without cost to any party.

Dated: New York, New York
March 10, 1975

GARVIN & BRONZAFT

By: _____
A Member of the Firm
Attorneys for Appellant
1501 Broadway
New York, New York 10036
(212) 244-5050

OLWINE, CONNELLY, CHASE, O'DONNELL & WEYHER

By: _____
A Member of the Firm
Attorneys for Appellee
U. S. Industries, Inc.
299 Park Avenue
New York, New York 10017
(212) 688-0400

PATTERSON, BELKNAP & WEBB

By: _____
A Member of the Firm
Attorneys for Individual Appellees
30 Rockefeller Plaza
New York, New York 10020
(212) 541-4000

Ex. D to Bronzaft affidavit

CHAUNCEY BELKNAP
JOHN J. DUNCAN
WINDSOR B. PUTNAM
RICHARD G. MOSES
THOMAS THACHER
ROBERT S. POTTER
LAWRENCE B. MORRIS, JR.
ROBERT P. PATTERSON, JR.
JOHN R. PERSON
ROBERT B. SHEA
ROBERT M. PENNOYER
FRANKLIN E. PARKER
CRAIG B. BRIGHT
HERBERT H. CHAICE
CHRISTOPHER G. STONEMAN
JOEL L. CARR
ROBERT D. SACK
D. ROBERT OWEN
ROBERT H. M. FERGUSON
ARTHUR H. KROLL
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TELEPHONE: (212) 541-4000
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WILLIAM L. CARY
COUNSEL

March 11, 1975

BY HAND

Nathaniel Fensterstock, Esq.
Staff Counsel
U. S. Court of Appeals
for the Second Circuit
U. S. Courthouse, Room 1804
Foley Square
New York, New York 10007

Jack Waltzer v. I. John Billera, et al., Civil Appeal, Docket No. 75-7112

Ex. D

Dear Mr. Fensterstock:

In accordance with our conversation with respect to disposing this appeal, enclosed are the two (2) Stipulations you requested.

All of the parties do not want to file the Stipulation dismissing the appeal unless and until the Stipulation approving the $42,000 attorneys' fees settlement is signed by the Court or a judge thereof. In short, if we cannot get court approval for the agreed upon disposition, then all parties want to proceed with the appeal.

If you have any questions, please do not hesitate to call me and if, as you indicated, there need to be revisions in the language of either Stipulation, please let me know.

Sincerely,

D. Robert Owen

D. Robert Owen

Enclosures
cc: Garwin & Bronzaft
Olwine, Connelly, Chase, O'Donnell & Weyher

Exhibit F to Bronzaft affidavit

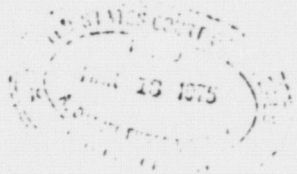
# United States Court of Appeals

## SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the thirteenth day of March , one thousand nine hundred and seventy-five.

Present:

Irving R. Kaufman, Chief Judge



Circuit Judges.

JACK WALTZER,

Appellant

-against-

L JOHN BILLERA, et al.,

Appellees.

75-7112

The parties having agreed that the above appeal may be dismissed with prejudice and without costs to any party in accordance with the terms of the stipulation which is filed herewith it is so ordered by this Court.

I.R. KAUFMAN, Chief Judge

Exhibit F to Bronzaft affidavit

U.S. INDUSTRIES, INC.
The company that makes a world of difference.
250 PARK AVENUE, NEW YORK, N.Y. 10017

No 3996

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| PAY TO THE ORDER OF | DATE | CHECK NUMBER | PAY | AMOUNT OF CHECK |
|---|---|---|---|---|
| GARWIN & BRONZAFT | MAR 19 75 | 13,996 | | $42,000.00 |

U.S. INDUSTRIES, INC.

MANUFACTURERS HANOVER TRUST COMPANY
350 PARK AVENUE
NEW YORK, N.Y.

⑆0210⑈0030⑆0135 0⑈23840⑈

options originally granted were intended to provide.

That fits consistently the company executive had undue options at prices ranging from $71.13-$98.62 and granted new ones at the market price of $59. Reports Colgate A. Adkinson (quoted, term): "The recipients were mostly middle managers, and their reception of the new options was enthusiastic."

That enthusiasm presumably is a little less now. For the company required each manager to wait at least until July of last year to exercise the new grant, and the shares are now selling above $70. If the year-end market price does not exceed the underwater option level, ten months. The option executive of course, console themselves that they are still better off than before since a smaller market rise will bail them out. But that is at best a negative satisfaction.

Needless to say, most of the companies that exchanged options in 1973 did not make out as well as the market [illegible] Hewitt for [illegible] exchanged options [illegible] the exercise price of $61.19 a share and gave its executives new ones at the mar[illegible] price of $29.38. It also exacted a small penalty by giving each man one-third fewer option shares the second time around. By the end of last year, however, the market price had doubled further to around $70, "so everyone who swapped is now about even on the deal or not options or stock that is worth only one-third of what it was two years ago," Bell & Howell, says a spokesman responsible, has no present plans for a second swap.

A second swap is of course one way out of the dilemma for companies that swapped too early. But stockholders and companies are still [illegible] some [illegible] different [illegible] executive compensation than management does. It is certainly risky to ask stockholders who own shares already selling bottom for a second time the pot for company executives with new, low-priced options. Companies that have already done it once are justified in [illegible] to go back and do it again. Gimbel Brothers, for example, persuaded Lee McKinney & Co. What are you going to tell them that you will invest [illegible] fashion?

At some companies where discontent is already widespread, aroused stockholders have brought suit to cancel an option swap. And in the cases that have actually gone to court, the protesting shareholders have won.

Back in 1970, for example, U.S. Industries granted new options at $47 each to executives who already held options on the shares at prices ranging from $70.50 to $84.50. The new options, said the conglomerate, could be exercised as soon as the earlier ones expired. But the USI board did not submit the swap to shareholders for approval. A minority stockholder then sued the company and several top executives on the ground that "individual defendants were unduly enriched," which he said, constituted "spoliation and waste of the assets" of the company. In a decision handed down in mid-1973, a federal district judge held the option swap null and void—not because it violated any IRS or SEC regulations, but because it contravened the terms of the USI option plan itself.

A case at discount. Our operator Vornado involving almost exactly the same circumstances was decided in the same way—a year by another court. The moral of both cases, observes Graef Crystal, vice president of consulting firm Towers, Perrin, Forster & Crosby, is that "if your company is going to do any swapping, you should look very carefully at your plan and the way it's written. And, to be safe, you ought to consider amending the plan even if that requires stockholder approval."

Some companies have done exactly that, well in advance of any specific plans for a swap. American Can, for one, went to shareholders last year to get approval for an exchange. The owners voted to let the board grant new options "at any price, for any term and under any conditions" it felt were desirable. American Can will thus sweep any embarrassment concerning an immediate swap. No, says Bruce Stryker, the company's compensation director. "But whenever we want to, we have the authority to go ahead."

McGraw-Edison, the Chicago appliance maker, also got permission from stockholders last year to exchange options. But according to Vice President Thomas McKay Jr., the company's secretary and general counsel, it has no immediate plans for doing so. Moreover, when the time comes, the company is in a position to be very selective in any swapping it does. As the 1974 proxy statement puts it, the compensation committee may "invite certain persons holding outstanding options to surrender such options to the company for cancellation. . . . In the event that such holders surrender those previously granted options, benefits may, but need not, be granted to them under the program."

The initiative, in short, remains with the company; there will be no automatic swap. In the meantime, McGraw-Edison is taking care of its underwater executives by being especially generous to them in the granting of new options.

### Doubling up is tricky

But doubling up on options is not always the right answer either. Some companies are in no position to issue new options at all because of the limit on the number of shares stockholders have authorized them to use for this purpose. And, again, there is the unpleasant task of asking shareholders for authority. Some companies have already had second thoughts about issuing new shares. Wheelabrator-Frye, for example, formally told its shareholders in 1973 that it wanted to increase the number of option shares available from 333,000 to 750,000. But as the market weakened, top management reconsidered, and President Michael D. Dingman sent a letter to all shareholders withdrawing the proposal. As he explained: "The recent significant decline in the market price of our stock leaves the whole matter of authorizing additional options [illegible] at this time open to serious misinterpretation by our stockholders."

Then, too, when a company has two sets of options outstanding, there is the possibility that an executive might profit excessively if the market trend is turned around. Here it makes a big difference whether the old options are qualified, and therefore run only five years, or nonqualified, with a ten-year term. Explains McKinsey's Foote: "A great many nonqualified options were granted in 1970 and 1971, following the tax changes of 1969. Those that were not exercised still have five or six years to run. If a company now gives out new ones, both sets may be outstanding for a long time. Given a sharp market upturn, the executive eventually could exercise both at a profit and make a lot more money than the company ever intended."

Right now, however, companies are

AFFIDAVIT OF VITO VINCENTI SWORN TO MAY 22, 1975 IN OPPOSITION TO AWARD OF FEES



UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

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ESTHER JACOBY,

Plaintiff,

-against-

72 Civ. 5442

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendants.

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STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK)

VITO VINCENTI being duly sworn, deposes and says:

I am a member of the firm of VINCENTI & SCHICKLER, the attorneys for the defendants in this action, and I am fully familiar with the facts herein, having been in charge of the defens of this action since its inception. I make this affidavit in opposition to plaintiff's application for attorneys' fees, accountants' fees and for other disbursements in this action.

The law and the arguments in opposition to this application are more fully set forth in defendants' memorandum of law submitted simultaneously herewith, and the attempt herein will be to set forth the factual bases for these arguments and merely to outline the same in this affidavit.

Your deponent urges that it is essential that it be borne in mind in this application by plaintiff for attorneys' fees, that ultimately and conclusively the actions of the defendants complained of in no way resulted in any harm or prejudice to the defendant corporation whatsoever

and, in fact, the amended option rights which were the subject of plaintiff's attack were never exercised by the optionees nor, in reality, would they have been, even without the institution of this action by plaintiff.

This suit was instituted by the filing of the complaint herein on December 29, 1972; a copy of which is annexed hereto as Exhibit "A". The complaint consists of twenty-one paragraphs asserting, in substance, causes of action alleging violations of Sections 10 (b) and 14 of the Securities and Exchange Act of 1934, and the common law claim of breach of a fiduciary duty by the individual defendants, officers of the corporate defendant, in connection with the granting on January 16, 1970 by the corporation of amended option rights claimed to be in violation of the Stock Option Plan adopted by the Board of Directors of the corporation on April 16, 1968 and approved by its shareholders on July 4, 1968. The plaintiff's common law claim of breach of a fiduciary duty, in fact, itself, had several points or branches to it, but, as will be more fully developed later in this affidavit and, in defendants' memorandum of law, the decision of the Court ultimately voiding the aforementioned amended option rights turned only on a single narrow point, viz, that the strict language of the Plan as construed by the Court did not permit the granting of the amended option rights. For present purposes, suffice it to say, that all claims and allegations of the complaint, including those asserting violations of the S.E.A. of 1934, were either dismissed or rejected by the Court, save the one referred to above.

The complaint itself is the virtual carbon copy of the complaint in another action, viz, Waltzer v. Billera 72 Civ. 2052 (S.D.N.Y.) per Judge Ryan, except for the plugging in of factual information such as the names, dates and peripheral transactions peculiar to the facts in the instant action. A

copy of the complaint in Waltzer is annexed hereto as Exhibit "B". The attorneys for the plaintiff in that action were the same as represented the plaintiff in the instant action. The plaintiff, Esther Jacoby was, at the time of the institution of this action the owner of fifty (50) shares, less than 1,000th of 1% of the total outstanding shares of the defendant corporation; her ownership was not of record--her stock being held, according to defendants' information by a brokerage firm.

In order to gain a full perspective on the posture of this suit, at its inception, it is necessary to point out that in March of 1972 and prior to the commencement of the instant action in December of 1972, and the action in Waltzer in May of 1972, another action, viz, Garwin vs. Cox et al, 72 Civ. 1220 (S.D.N.Y.) per Judge Metzner was brought based on exactly the same substantive allegations as are set forth in the complaint in this action, as well as in Waltzer. The complaint in Garwin is annexed hereto as Exhibit "C". In fact, the opinion of the Court, per Judge Metzner, granting defendants motion for summary judgment and denying plaintiff's motion for like relief, refers to Waltzer v. Billera, and states:

> "This case is on all fours with the recent decision of Waltzer v. Billera, CCH Fed. Sec. L. Rep. ¶ 94,011 (S.D.N.Y. May 23, 1972), in which Judge Ryan granted summary judgment to the defendants on a 10b claim on strikingly similar facts."

In two of the actions, viz, Waltzer and the instant action, the attorneys for the plaintiff were the same, to wit, Garwin & Bronzaft. While the attorney of record in Garwin vs. Cox is one Milton Paulson, it is significant that the plaintiff in that action was, in fact, Sidney Garwin of Garwin & Bronzaft. These three suits are therefore related, not only by way of the substance of the claims and the grounds alleged, as well as the

distinct similarity of the language in the complaint, but also by way of the attorneys and parties involved on the side of the plaintiffs therein.

The decision in Garwin vs. Cox terminated that action in favor of the defendants on the basis of the substantive finding that there had been no violations of the S.E.A of 1934, and that there was no sufficient diversity of jurisdiction [plaintiff therein, as well as one of the defendants was a New York resident] to sustain the maintenance in the Federal Courts of the common law counts. Accordingly, at the very outset, we have three suits, the other two having been commenced prior to the instant action, asserting not only exactly the same grounds but, in substance, virtually the same facts.

The facts providing the background and bases for plaintiff's claims in the instant action are simply stated. On April 16, 1968, the board of directors adopted a "qualified" Stock Option Plan, the purposes of which are stated therein as ". . . to provide an incentive to key employees of Vornado, Inc. and its subsidiaries ("Company"), including officers and directors who are employees, to contribute to the success of the Company by purchasing a proprietary interest in the Company, and to offer an additional inducement in obtaining and retaining the services of key personnel. Purchases shall be made in accordance with "qualified stock options" issued pursuant to the Internal Revenue Code of 1954, as amended ("Code")".

The shareholders of Vornado approved the Plan on June 4, 1968. The Plan is a "qualified" Plan within the meaning of the Internal Revenue Code of 1954. The Plan directed the board of directors to appoint a stock option committee consisting of not less than three nor more than five of the directors of Vornado to administer the Plan. The Plan authorized the corporation to grant options to key employees to purchase in the

aggregate not more than 297,000 shares of the common stock of the corporation. Paragraph "2" of the Plan provides in part: ". . . Any shares subject to an option which for any reason expires or is terminated unexercised as to such shares, shall again become available for options under the Plan".

Paragraph "8" of the Plan provides as follows:

> "8. Prior Outstanding Options. Any option granted to an optionee shall not be exercisable while any options previously granted to him to purchase Common Stock at a higher price under this or any other option plan of the Company remain outstanding within the meaning of Section 422(c)(2) of the Code."

Pursuant to the Plan, the committee, during the period from July 1968 to January 15, 1970 granted the approximately 363 officers and employees of Vornado five year options to purchase an aggregate of 283,500 shares of Vornado's common stock at a price equal to the market value of the shares on the date of the grant. The prices ranged from $23.00 to $25.07 per share.

Towards the end of the year 1969 and early 1970, the market price of Vornado's common stock began to decline [as did the stock of many other publicly held companies at that time]. From December 20th to 31st, 1969, Vornado stock traded at from $15-5/8 to $18-1/4 per share. Between January 1st and January 16, 1970, the price of the stock ranged from $13-3/4 to $17-1/8 per share. The stipulation of facts entered into between the attorneys for the parties in this action and upon which the decision and judgment of the Court disposing of this suit was based states that if called to testify Alvin C. Martin, Sr., Vice-President and Secretary and Director of Vornado would testify that the committee's meeting on January 16, 1970 dealt with the fact that the then outstanding stock options had lost, for all practical purposes their value as a means of enhancing the incentive of Vornado's officers and employees, as had been contemplated by the 1968 Option Plan, due to the overall market decline; that

at the time there was considerable talk in the business community that the market decline created a danger that key executives would be tempted to move from one company to another in order to obtain options that were more in line with market conditions; that these were the factors that governed the committee's adoption of the resolution referred to below.

On January 16, 1970, the committee unanimously adopted and the board of directors of Vornado unanimously approved a resolution authorizing the corporation to modify the option contracts granted by the corporation pursuant to the Plan so as to provide:

(a) That the option can be exercised at a price equal to the fair market value of the Vornado stock on January 16, 1970 [$14.69 per share]; and

(b) That the modified option rights were not exercisable prior to the expiration of the five year term under the options as originally granted; and

(c) That the number of shares purchasable under the modified (amended) option rights must be reduced by the number of shares purchased by any optionee under the original option rights.

Inasmuch as the original option rights were first granted by Vornado in July, 1968 and, pursuant to the Plan, the term of each option ". . . shall be for a period not exceeding five years from the date of granting thereof. . . " [paragraph "6" of the Plan], the first of the original option rights would not expire and, therefore, the amended option rights would not begin to be exercisable until July 1973. Accordingly, the amended option rights, since they too were subject to the five year term set forth in the Plan and were granted following the adoption of the aforesaid resolution on January 16, 1970, had an effective life during which they were actually exercisable of approximately eighteen (18) months, i.e., from July 1973 to approximately January

15, 1975. Pursuant to the Plan and the resolution adopted by Vornado respecting the amended or modified stock option rights, those amended rights were exercisable during this eighteen (18) month period and only during this 18 month period.

Immediately following the adoption and ratification of the resolution authorizing the amended option rights, Vornado entered into agreements with each of its employees then holding option rights implementing that resolution and modifying the outstanding option agreement in accordance therewith. Stockholder approval of the January 16, 1970 resolution was not sought or obtained, however, notification of the resolution as sent to the Vornado shareholders in its proxy statements respecting the annual shareholders meetings for the years 1970, [illegible] and 1972. No objection was made by the plaintiff, or anyone else to the January 16, 1970 resolution at any time until the institution of this action by the plaintiff on December 29, 1972. The plaintiff was the only person to object to this action.

From and including the month of July, 1973 when the amended stock option rights became first exercisable to and including the present, the market price of Vornado stock at its high on the average for each of the months during this period never exceeded $9-1/2 per share. In fact, the average monthly high for this entire period was approximately $7-1/8 per share. Accordingly, the facts themselves dispel any real possibility that any of the amended option rights would have been exercised during the entire period that these rights were viable and exercisable. In fact, none of the amended option rights were exercised or attempted to have been exercised, no Vornado stock was purchased pursuant to the amended rights at the price of $14.69 per share, and by no means could it validly be asserted

that Vornado suffered any loss or damage as a result of the action of January 16, 1970 authorizing the granting of the amended option rights. The accounting submitted by Vornado to the Court following its decision in this action demonstrated the acknowledgment and agreement of each and every holder of amended option rights to cancel those rights and further demonstrated that none of the rights had been exercised. Ultimately, the accounting conclusively demonstrated that Vornado suffered no harm or prejudice as a result of the granting of the amended option rights.

Following the institution of this suit by the plaintiff on December 29, 1972 by means of the filing of the summons and complaint in this action, the objective of Vornado was to bring about its immediate resolution so as to clarify the status of the option rights for the Vornado employees and so as to avoid further disruption and diminishing of the morale of its key employees. The corporation was aware, at the time of the pendency of the action in Waltzer, per Judge Ryan and of its similar facts and circumstances to the instant action. Accordingly, at the outset, your deponent's firm requested of the Coordinating Clerk of the Court that the instant action be transferred to Judge Ryan so that, with a view toward early disposition, both suits could be determined by the same Court. In addition, prior to the filing of an answer, and approximately on March 9, 1973, your deponent's firm served and filed an application to the Court to dismiss the complaint and for summary judgment pursuant to Rules 12(b) and 56 FRCP. That application was adjourned from time to time to approximately the end of June 1973. No answering papers or memoranda were ever served or filed by plaintiff's attorneys in opposition to this application. In February 1973, the attorneys for the plaintiff served upon your deponent's firm a three page Notice to produce certain documents. In May of 1973, prior to any

determination of plaintiff's application to dismiss and for summary judgment, the decision of the Court, per Judge Ryan in Waltzer v. Billera was handed down. That decision which is dispositive of the substantive issues in that suit, a copy of which is hereto annexed as Exhibit "D", granted summary judgment in favor of the defendants on the claims predicated upon alleged violations of Sections 10(b) and 14 S.E.A. of 1934 and granted summary judgment to the plaintiff but only on the single basis that the amendments to the options granted under the basic Plan of the corporation (U.S. Industries Inc.) in that case, were not countenanced by that stock option plan and were void (see the last page of the Court's opinion).

In the light of the decision of Judge Ryan in Waltzer, Vornado, through your deponent's firm sought to take immediate steps to effectuate a determination of the issues in this suit, on the same basis as in Waltzer. The position of Vornado was that it would be distinctly more beneficial to the corporation to immediately remove any existing doubt or cloud respecting option rights granted to employees even if it meant an adverse determination in this lawsuit on the single narrow issue of whether the 1968 Stock Option Plan permitted the granting of the amended option rights. Since none of the amended option rights had been exercised and the entire question of the validity of the amended option rights was essentially academic, it was concluded by Vornado that it was better to have the issue as to the validity of these rights determined, even adversely, rather than to perpetuate the unsettled and demoralizing status of the stock option rights granted to key employees. Clearly, the corporation could issue new option rights upon the expiration (which, at the time was imminent) of the rights granted under the original options pursuant to the 1968 Stock Option Plan. The decision of Judge Ryan in Waltzer and the prospect of prolonged litigation, including appeals

in the instant action, with the attendant prolongation of the uncertainty respecting the status of the Vornado amended option rights crystalized Vornado's decision to concede on the single issue of whether the Plan, by its language, countenanced the granting of the amended options.

Accordingly, at the first pre-trial hearing before Judge Pierce in this action, your deponent made the Court aware of Vornado's position and desire to concede, as aforesaid. At all times, however, your deponent made it clear that the defendants' position was that plaintiff was not entitled to attorneys' fees or any other expense in connection with this action, and defendants expressly reserved their rights to litigate this issue. It was ultimately agreed between counsel for the parties in this action and the Court that the rapid disposition of this action in accordance with the decision of Judge Ryan would best be brought about through the mechanics, also implemented in the Waltzer case, of a stipulation of facts and the determination of the Court based thereon as though the matter had actually been tried with evidence adduced as in the stipulation. The stipulation of facts was prepared by your deponent's firm, after discussions with plaintiff's attorneys, signed by the attorneys for the respective parties and submitted to the Court on or about November 12, 1973. A copy of that stipulation of facts is annexed hereto as Exhibit "E". (Note that the attachments to the stipulation of facts, because of their bulk, are not included and will be handed up to the Court upon request). Memoranda of law in support of their respective positions were submitted by both the attorneys for the plaintiff and your deponent's firm in late November and early December, 1974. The defendants' memorandum was required, in your deponent's view, because the ostensible posture of the suit was that the action was being tried on stipulated facts, that your deponent wished to

urge and make clear to the Court all aspects of defendants' position so as to avoid any possibility that the Court's determination would be on any grounds other than the narrow issue that a construction of the language of the 1968 Stock Option Plan would not clearly permit the granting of the amended option rights pursuant to the action taken on January 16, 1970, and that the Court was entitled to full and complete exposition of all issues and arguments in this action in order to fairly arrive at its determination. In order to do this, all points on all issues in the action had to be raised and even the construction of the Plan itself argued. However, as previously noted, your deponent had made its willingness to concede on the basis of the Ryan decision, clear to the Court, had reiterated this on a number of occasions to plaintiff's counsel, and in fact, ultimately forwarded its letter of December 21, 1973 to the Court setting forth the need and benefit to the corporation of a quick disposition and that "Because of these exigencies, the corporation is prepared to accept a decision by your Honor based upon the ruling in Waltzer vs. Billera. . . per Judge Ryan, that the act of the corporation in January 1970 was a technical violation of the corporation's 1968 Stock Option Plan and, therefore, technically in violation of the state law of Delaware". A copy of that letter is hereto annexed as Exhibit "F". The position of the defendants that plaintiff was not entitled to costs of litigation, including attorneys' fees was reiterated in that letter.

Clearly, the determination of the Court in this action is one based upon the concession of the defendants as to the narrow technical issue referred to above. In fact, the memorandum opinion of the Court in this Action, a copy of which is annexed hereto as Exhibit "G" clearly demonstrates that the sole basis for the Court's decision was the narrow determination that the amended options were not countenanced by the language of the Stock Option Plan. The Court states on page 15 of its opinion:

"In view of the above, the Court finds that neither consecutive or "tandem" options or new options were contemplated by the plan as the defendants contend and that on the contrary the 1970 amendment was not countenanced by the plan. It therefore concludes that the amendment and the options granted pursuant to it are null and void."

The narrowness of the basis of the Court's decision is patently demonstrated by the background of this action and the arguments of counsel in their respective memoranda. It should be borne in mind that the Vornado Stock Option Plan was a "qualified" Stock Option Plan pursuant to the Internal Revenue Code of 1954. The Plan was adopted with the specific provisions of the Code and its regulations in mind and, in many respects, constitutes a verbatim repetition or paraphrasing of these provisions. The amended stock option rights granted by Vornado pursuant to the January 16, 1970 action were designed and contemplated to be in conformity with the provisions of the Code which specifically, under its regulations, permits "tandem" options, i.e., options granted prior to the expiration of already existing option rights respecting the same stock, which "tandem" options, however,were not exercisable until the expiration of the term of the original options and only with respect to stock not acquired under, but subject to, the original options. These "tandem' provisions of the Code were precisely what was adopted by Vornado pursuant to the January 16, 1970 action. They are authorized and countenanced by the Code for "qualified" status. In fact, the plaintiff's attorneys concede that after much investigation, they have determined that Vornado did not violate the Internal Revenue Code. The arguments of defendants in their memorandum in support of a finding by the Court that the Stock Option Plan of 1968 by its terms did permit the granting of the amended option rights were twofold:

1. That pursuant to the provisions of paragraph "2"

of the Stock Option Plan quoted above, the Plan contemplates that no shares subject to an option which expires or is terminated shall again become available for options under the Plan and, therefore, the Plan contemplated the granting of "tandem" options--an argument which was also offered by the defendants in Waltzer; and

2. That pursuant to the provisions of Paragraph "8" of the Plan quoted above, the language ". . . shall not be exercisable. . ." contemplated the granting of "tandem" options prior to the expiration of previously granted options but which are not exercisable until the expiration of the previous options--an argument not offered in Waltzer, because the Plan of U.S.I. therein did not contain provisions such as are contained in paragraph "8" of the Vornado Plan.

The Court rejected both of these arguments of Vornado, the first on the same basis as in Waltzer, i.e., that ". . . the language [of paragraph "2" of the Vornado Plan as in the case of Waltzer] is clear that a new option shall not be granted with respect to particular shares, which are already the subject of an option, until the first option has expired or been terminated." (See page "11" of the Court's opinion) The second argument respecting paragraph "8" of the Plan was rejected by the Court, on the basis that:

> ". . . Section 8 merely addresses itself to the quite likely possibility that an individual could very well have options which had been granted on different dates and consequently, the option prices would be different. . . This section says nothing whatsoever about the granting of consecutive options on the same shares to the same individual. If such was the intended result, a cryptic manner was certainly chosen to achieve it. The Court feels that a more reasonable explanation for the language of Section 8 is that it was intended to comply with one of the requirements needed in order to qualify the Plan as a "qualified" Stock Option Plan under the Internal Revenue Code [Section 422] and thereby provide the option holders under the Plan with the appropriate tax benefits". (See pages 12 and 13 of the Court's opinion)

The reasoning of the Court is analyzed herein in this close detail to demonstrate factually on this application

that the sole basis for the determination of the Court in this lawsuit was the very narrow technical determination that neither the strict language of paragraph "2", nor that of paragraph "8" contemplated the granting of "tandem" options as permitted by the Internal Revenue Code and, even more narrowly, that the word "exercisable" in paragraph "8" of the Plan did not contemplate the granting of option rights respecting stock while original option rights respecting the same stock were still outstanding and unexpired, even though the new or amended option rights were not exercisable. In fact, the determination of the Court, it is submitted, turned upon the interpretation of one word in the Plan, to wit, the word "exercisable". It is submitted that it is difficult to conceive of a more narrow or technical basis for a Court's determination.

The Court's opinion, disposing of the substantive issues of this action, resulted in its judgment, a copy of which is annexed hereto as Exhibit "H", which provided, in sum, that the amended stock options were not contemplated and countenanced by the Plan and were therefore null and void; that the individual defendants shall account to Vornado for damages, if any, sustained by Vornado in connection with the actions taken on January 16, 1970; that the defendants shall procure the cancellation of the amended option agreements and file an accounting or report with the Court within sixty (60) days; that judgment be granted in favor of defendants dismissing plaintiff's claims under Sections 10(b) and 14 S.E.A. of 1934; that plaintiff's application for reasonable legal fees and disbursements shall be set down for a hearing. Pursuant to the aforesaid judgment, defendants rendered their accounting to the Court which consisted of a list of all persons receiving rights under the amended options, the number of shares subject to the amended option rights, the

dates of any terminations of these rights prior to the time of the judgment and the accounting, and the acknowledgments of optionees, whose amended option rights had been terminated, cancelling their rights under the amended options. The "extensive" accounting [as the same is referred to by plaintiff's attorneys] consisted almost entirely of acknowledgments, each of them alike in form and substance, from each of the optionees holding amended option rights which had not previously been cancelled, cancelling those rights. Upon request, the copy of this accounting or report will be handed up to the Court. The accounting itself is simple; no calculation is required except the tallying of the terminated amended option rights and the cancelled option rights against the total amended option rights granted pursuant to the action of Vornado taken on January 16, 1970. Your deponent's firm forwarded a letter of further explanation to plaintiff's attorneys on July 16, 1974. In sum, the amended option rights were granted pursuant to the action taken on January 16, 1970 affecting 329,650 shares of Vornado common stock. Prior to the Court's decision on January 17, 1974, amended option rights affecting 103,850 shares of stock were terminated by virtue of termination of employment or death. The balance of the amended option rights affecting 168,000 shares of common stock were cancelled by virtue of agreement of the optionees, copies of which were submitted in the defendants' accounting. Accordingly, it is submitted that none of the amended option rights were exercised at any time, that no stock of Vornado was acquired pursuant to those rights; that accordingly Vornado suffered no harm or prejudice and, in fact, no monetary transactions were effectuated respecting the amended option rights.

It is respectfully urged that the final blow to plaintiff's claim for attorneys' fees and litigation expenses in this action came with Judge Ryan's decision denying plaintiff's application for attorneys' fees and such expenses in Waltzer. That decision

was handed down on or about January 17, 1975, and a copy of the same is attached hereto as Exhibit "I", as well as to plaintiff's affidavit on this application. Judge Ryan stated in that opinion:

> "This application is denied principally because it does not appear from the accounting which has been filed by the defendants pursuant to the judgment of this court that the corporate defendant has been substantially benefited as a result of plaintiff's counsel's efforts or that the individual defendants were enriched as a result of the acts complained of." (emphasis ours)

It is respectfully urged that if the Court in Waltzer denied plaintiff's application for attorneys' fees and expenses as it did, on the basis that therewas no substantial benefit to the corporation, then a fortiori, there is patently no substantial benefit to Vornado as a result of this action instituted by plaintiff herein for the following reasons:

(1) The granting of attorneys' fees and expenses to plaintiff's attorneys in Waltzer was consented to, or not opposed, by the defendants therein;

(2) As is indicated in Judge Ryan's decision on attorneys' fees in Waltzer, some of the optionees holding amended option rights did not consent to the cancellation of those rights;

(3) As is indicated in Judge Ryan's decision on attorneys' fees in Waltzer, some of the amended option rights which were subject to the plaintiff's attack were actually exercised, thereby bringing about a loss to the corporation and a profit to the optionees of about $3,000.00;

(4) Because of the existence of Paragraph "8" in the Vornado Stock Option Plan and its absence in the U.S.I. Plan, the decision in the instant action was even more narrow and more technical than that in Waltzer.

The decision of Judge Ryan respecting attorneys' fees and expenses has in no way been overturned and its stare decisis

effect has remained unimpaired. The appeal taken by plaintiff in Waltzer from that decision of Judge Ryan resulted, as is clear, from Exhibits "B", "C", "D" and "E" attached to plaintiff's affidavit in this action, in a settlement of the issue of attorneys' fees and a dismissal of an appeal. It was only this dismissal, with prejudice and without costs, which Chief Judge Kaufman approved by virtue of Exhibit "E" attached to plaintiff's affidavit. The appeal was never decided; Judge Ryan's opinion was never reversed, modified or otherwise affected by the settlement and dismissal; Judge Ryan's decision, as precedent, remains in full force and effect. That decision is, as conceded by all parties, on all fours with the circumstances in the instant action. It is respectfully urged that the decision of Judge Ryan in Waltzer on attorneys' fees, like the decision of the same Court on the substantive issues in this case, should be determinative of the issues presently at bar in the instant action.

In sum, the instant application of the plaintiff for attorneys' fees and expenses is made under circumstances where the following operative facts are brought to bear:-

(a) The amended option rights which are the subject of the attack of the plaintiff in this action were never exercised, there were no monetary transactions with respect to the same, and conclusively and admittedly the corporation suffered no harm or prejudice;

(b) The realities are that in fact, the amended option rights would not have been exercised, even absent this lawsuit, since the market price of the Vornado stock during the entire period of time that the amended rights were viable and exercisable never approached the option price of $14.69 per share;

(c) The decision of Judge Ryan in Waltzer, on all fours with the facts in the instant action is determinative that there was in fact no substantial benefit to the corporation as a result of the bringing of this action and is, therefore,

ultimately dispositive of the issue of the right to attorneys' fees and expenses in this action;

(d) There is even greater reason to deny attorneys' fees and expenses to plaintiff in this action than there was in Waltzer for the reasons set forth above;

(e) The ultimate determination by the Court of the issues in this lawsuit turned on a technically narrow interpretation and construction of the language in the Vornado Plan, which Plan and language, and the amended stock option rights, were all adopted and effectuated by Vornado in good faith, for purposes of complying with the strict regulations relating to "qualified" stock options under the Internal Revenue Code of 1954;

(f) The circumstances surrounding the bringing of this lawsuit, including the existence of two prior actions based upon virtually the same grounds and facts, with "carbon copy" complaints, the determination of this action within the atmosphere of defendants' concession as to the narrow issue upon which the Court's opinion actually turned, and the fact that whatever work was performed by plaintiff's counsel was, of necessity in large part, performed respecting the claims of violations of the S.E.A. of 1934 and other issues which were ultimately determined adversely to the plaintiff, are, it is respectfully submitted, demonstrative that real productive efforts of plaintiff's attorneys in this action, even in bringing about an academic result, were at best, minimal. Defendants' position should be made patently clear that the claims of plaintiff in this action as to violations of the S.E.A. of 1934 were totally devoid of merit and frivolous. Not a scintilla of evidence was adduced in support of plaintiff's position on these claims. The corporation was put to the burden of defending this aspect of the action which was made entirely of whole cloth. Moreover, plaintiff made no showing whatsoever in support of her claims of lack of consideration for the granting of the amended stock options or with respect to any of its other claims, save the narrow one referred to above. As to the claim of "uniqueness" or work in connection with the

development of the theory of this action--it is not only clear that this theory had been used in at least two prior actions, but that apparently, the theory had been developed by another attorney in Garwin vs. Cox, to wit, Milton Paulson. The argument as alluded to at page "24" of plaintiff's affidavit in support of this application, that some portion of the work in Waltzer should be allocated to this suit for purposes of determining attorneys' fees is not only patently absurd but would affect a result whereby plaintiff's attorneys would be paid twice for the same work. The circumstances of the suit and the basis for its ultimate substantive disposition also demonstrate that plaintiff's only viable theory not only lacked "uniqueness" but was in fact a simple straightforward issue of the construction of the terms of a contract--the Vornado Stock Option Plan. Accordingly, not only is the basis for the Court's substantive decision in the instant action a narrow technical one, as shown above but, in addition, its assertion in the light of this lawsuit requires no special, complex or intricate knowledge of the area of corporate law or of stockholders derivative litigation. Regardless of the amount of experience of plaintiff's attorneys, that experience has cogency on this application only if it is relevant to the ultimate disposition of this lawsuit---a relevancy which, it is submitted, is wholly non-existent.

(g) Even plaintiff's claim of a "victory" in this action is highly dubious in the light of the concession of the defendants on the narrow issue upon which the Court ultimately determined this suit. Moreover, if in fact, as plaintiff claims, this suit was brought with the benefit of the corporation in mind, in view of the cloud that it cast upon key employees' option rights and the attendant effect upon their morale, the "victory", if it exists, is indeed pyrrhic.

WHEREFORE, it is respectfully prayed that plaintiff's application herein be in all respects denied.

VITO VINCENTI

Sworn to before me this

22nd day of May, 1975

[illegible]
Notary Public, State of New York
No. 41-4459821
Qualified in Queens County
Commission Expires March 30, 19[illegible]7

Exhibit B to Vincent affidavit



SUMMONS IN A CIVIL ACTION

CIV. 1a (2-61)
(Formerly P. C. Form No. 45a Rev. (6-1))

# United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

77 CIVIL ACTION FILE NO. 2058

JACK WALTZER,

Plaintiff

v.

I. JOHN BILLERA, CHARLES E. SILCOTT, HENRY H. FOWLER, CYRIL V. [illegible], DAVID M. KIRBY, HENRY V. POLLEN, CHARLES A. [illegible], WARREN LEE PIERSON, CLAYTON J. PUGLEY, PHILIP A. ROTH, H.L. CRAGO, [illegible] T. DEER, C. R. LUICE, ARTHUR S. NICHOLAS and U.S. INDUSTRIES, INC.,

Defendant

SUMMONS

PLAINTIFF DEMANDS TRIAL BY JURY

To the above named Defendant:

You are hereby summoned and required to serve upon

CAHILL & GORDON

plaintiff's attorney, whose address is 1501 Broadway, New York, New York 10036

an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[illegible]
Clerk of Court

[illegible]
Deputy Clerk

Date: May 12, 1967

[Seal of Court]

Note:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - - - - x

JACK WALTZER,

Plaintiff,

-against-

COMPLAINT

I. JOHN STILLMAN, CHARLES G. [illegible],
[illegible],
[illegible],
[

§14 and under the rules and regulations issued pursuant to said Act, including Rule 10b-5 and under the common law.

(c) The acts and transactions complained of occurred in substantial part within the Southern District of New York.

(d) Jurisdiction of the Court rests upon §27 of the Act and the rules and regulations promulgated under said Act and diversity of citizenship.

(e) Diversity of citizenship jurisdiction is asserted only with respect to defendant who are not citizens of the State of New York.

(f) The defendants, with respect to whom diversity of citizenship jurisdiction is asserted, are citizens of States other than New York.

(g) The amount in controversy, exclusive of interest and costs, exceeds $10,000.

(h) This suit is not a collusive one to confer upon this Court jurisdiction of an action of which it would not otherwise have jurisdiction.

4. The shares of the common stock of Industries are presently being traded on the New York Stock Exchange, a national securities exchange, as defined by the Act.

5. The following individuals were directors of Industries during the period set forth opposite their names and at various times held the positions with Industries listed next to their names:

| Name | | From | To |
|---|---|---|---|
| I. John Miller | Chairman of the Board and Chief Executive Officer | 1 63 | date |
| Charles C. Baldwin | President | 1 66 | date |
| Henry H. Fowler | | 1 6 | date |
| H. L. Grace | Exec. Vice President | 5/6/70 | date |
| Charles W. Leonard | | 1 6 | date |
| Herbert T. Kerr | | 5/6/70 | date |
| F. H. Firby | | 1 65 | date |
| Henry V. Rubin | Exec. Vice President | 1 66 | date |
| Charles A. Dore | | 1 63 | date |
| Warren Lee Pierson | | 1 66 | 4/30/7 |
| Clarence J. Flisly | Exec. Vice President | 1 66 | 6/71 |
| Philip A. Roth | | 1 58 | 1 70 |
| C. R. Luigs | | 6/4/71 | date |
| Arthur S. Nicholas | | 8/4/71 | date |

6. On July 11, 1 67, the Board of Directors of Indust[illegible] adopted a Qualified Stock Option Plan (hereinafter "1 67 Plan") which was approved by its stockholders on August 2?, 1 67. Said 1 67 Plan is annexed hereto, marked Exhibit A and made a part hereof.

7. On April 30, 1 66, the common stock of Industries was split on a basis of two-for-one. Accordingly, pursuant to the terms of the 1 67 Plan, the Board of Directors became authorized to issue options on a total of [illegible],000 shares of the common stock of Industries.

8. As of March 31, 1970, Industries had granted options under the 1967 Plan to purchase 407,642 shares at prices ranging from $20.50 to $34.50 per share. Each of said options could be exercised during a period of five years from the date of the grant, subject to the restrictions in the 1967 Plan.

9. On July 16, 1970, the Board of Directors of Industries, without prior stockholder approval, amended option contracts outstanding under the plan which were entered into after January 1, 1968, so as to permit the exercise of options to purchase Industries' stock at $12.00 per share, provided, however, that the said options may be exercised at $12.00 per share only during the period between the expiration of the five year terms of the original option contract and July 15, 1975, and only to the extent not previously exercised.

10. Included in the aforesaid options which were modified were options granted to directors and officers of Industries to purchase approximately 125,000 shares of its stock.

11. The following individual defendants were among the recipients on July 16, 1970 of the modified options to purchase common stock of Industries at $12.00 per share:

| | |
|---|---|
| Billera | 27,000 shares |
| Seleeman | 11,000 shares |
| Cruce | 7,000 shares |
| Kerr | 4,000 shares |
| Robin | 12,000 shares |
| Pilsbury | 17,000 shares |
| Hall | 6,000 shares |
| Nicholas | 2,500 shares |

12. The names of the other optionees, whose options to purchase an aggregate of approximately 300,000 shares of stock were modified on July 16, 1970 by Industries, are unknown to plaintiff at this time.

13. As of July 16, 1970, the Board of Directors of Industries and its subcommittees did not have the power or authority, without stockholder approval, to reduce the price under which an option could be exercised to less than the fair market value of such stock on the date the option was granted, nor to extend the period during which an option could be exercised to a period longer than five years.

14. The aforesaid amendment of the options granted prior to July 16, 1970, modified each of the options to permit it to exceed a period of five years in violation of the 1967 Plan and, in addition, modified the price at which the option could be exercised so that it was lower than the fair market value of the stock of Industries on the date the option was granted.

15. The amendment of the options on July 16, 1970, was null and void for the following reasons:

(a) By the terms of the 1967 Plan, there was no authority given to the Board of Directors to modify the options so as to permit options theretofore granted to be exercised at prices lower than the fair market value at the date the options were granted.

(b) By the terms of the 1967 Plan, there was no authority given to the Board of Directors to extend the time during which the options could be exercised for a period in excess of five years after the date of the grant.

(c) At least 50% of the Board of Directors were beneficiaries and were unjustly enriched by the modification of the options to permit their exercise at prices lower than the fair market value of said stock on the date the option was granted.

(d) At least 50% of the Board of Directors were beneficiaries and were unjustly enriched by reason of the modification of the 1967 Plan to permit their exercise for a period in excess of five years.

(e) There was no majority of disinterested directors which could or did authorize the modification of the 1967 Plan.

(f) There was no consideration for the modification of the options.

(g) At the time that the 1967 Plan was approved by the Board of Directors, it required, as a prerequisite, to be effective that the 1967 Plan receive stockholder approval. In addition, the 1967 Plan provided that any changes in the Plan which permitted the options to be exercised at prices lower than the fair market value of the stock at the date an option was granted, or which extended the period during which an option could be exercised by a period in excess of five years, could

only be effectuated with the consent and approval of the stockholders. There was no request for and no approval given by the stockholders for the aforesaid modification of the options granted under the 1967 Plan.

16. Since July 16, 1970, Industries' common stock has sold on the New York Stock Exchange at prices in excess of $20.00 per share.

17. The reduction of the price at which the option to purchase Industries' stock under the 1967 Plan could be exercised by the optionees, constituted spoliation and waste of the assets of Industries and constituted a gift by Industries of its assets to said optionees and particularly to those optionees who were officers and directors of Industries.

18. The defendants, directly and indirectly, made use of the means and instrumentalities of interstate commerce, of the mails and of the facilities of the New York Stock Exchange in connection with the actions, practices and course of busine alleged herein.

19. By the acts and conduct herein alleged, defendant employed devices, schemes and artifices to defraud; made untru statements of material facts and omitted to state material f necessary in order to make the statements made in the light of the circumstances under which they were made not misleadin; engaged in acts, practices and a course of business which operated and were calculated to operate as a fraud and deceit upon Industries; all in connection with the purchase and sale of securities, to wit, shares of Industries' stock, in viol of §10(b) and Rule 10b-5 promulgated thereunder.

20. Defendants who were directors of Industries at the time of the transactions alleged herein, knew or should have known that the modification of the options to purchase 407,502 shares of stock at prices of $20.50 to $34.50 to permit said stock to be purchased at $12.00 per share and extending the period during which the options could be exercised, for no consideration, was designed to enable the optionees to acquire Industries' shares at grossly inadequate prices, in violation of the terms of the 1967 Plan.

21. Defendants violated their fiduciary duty to Industries and its stockholders by modifying the options to permit the purchase of Industries' stock at a price of $12.00 per share and extending the period during which said options could be exercised. Said modifications of the options were known to the defendants to have been granted for no consideration and solely in order to enrich the optionees, and particularly said optionees who were officers and directors of Industries.

22. The Board of Directors of Industries issued proxy statements dated March 17, 1971 and March 15, 1972, which were false and misleading in the following respects:

(a) Said proxy statements failed to disclose that the Board of Directors of Industries had, on July 16, 1970, modified outstanding stock options in violation of the terms and provisions of the 1967 Plan, by lowering the price at which the options could be exercised below the fair market value of the stock at the time the options were originally granted.

(b) Said proxy statements failed to disclose that on or of July 16, 1970, the Board of Directors of Industries had modified outstanding stock options in violation of the provisions of the 1967 Plan in that said options could be exercised during a period of more than five years.

23. The exact amount of profits realized and retained by the individual defendants and the other optionees and the exact amount of damages sustained or to be sustained by Industries are presently unknown to plaintiff.

24. Demand on the Board of Directors of Industries to bring this action would be futile for the following reasons:

(a) A majority of the Board of Directors of Industries participated in and benefited from the wrongful acts in the transactions which are the subject matter of this complaint;

(b) Institution of this action by the Directors would prevent effective prosecution because said Directors would be defendants in this action.

WHEREFORE, plaintiff, on behalf of himself and all others similarly situated, respectfully demands judgment against the defendants as follows:

(a) that the modification of the options made as of July 16, 1970 be declared null and void;

(b) that the individual defendants and all optionees whose options were modified to enable them to purchase stock at lower prices be enjoined from exercising the options as modified;

(c) that the individual defendants account to Industries for all profits realized by any of them from the exercise of the options as modified;

(d) that defendants account for all losses and damages sustained by plaintiffs as a result of the matters set forth above;

(e) that the plaintiffs be allowed the costs and disbursements of this action, including reasonable attorneys' and accountants' fees.

(f) that the plaintiffs have such other and further relief as the Court may deem proper.

[illegible]

[illegible]
[illegible]
Attorneys for Plaintiff
[illegible]
[illegible], New York 10036
Tel: [illegible]

State of New York )
: ss.:
County of New York )

JACK WALTZER, being duly sworn, deposes and says that he is the plaintiff in the within action, that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

JACK WALTZER

Sworn to before me this
11th day of MAY, 1972

---

Notary Public

EXHIBIT A

1967 STOCK OPTION PLAN

1. *Purpose.* The purpose of the Plan is to assure the continued services of officers and other key employees and to attract new employees of outstanding ability, by providing an opportunity for them to acquire a proprietary interest in the business of the Corporation, resulting in an increased personal interest in its continued success and progress.

2. *Scope of the Plan.* Options to purchase a total of not to exceed 250,000 shares of the Common Stock of the Corporation (par value $1) may be granted under the Plan, subject to adjustment under the provisions of paragraph 8. The shares of Common Stock to be optioned under the Plan may be authorized but unissued stock or stock issued and reacquired by the Corporation. If an option shall expire or be terminated for any reason prior to the termination of the Plan without having been exercised in full, the unpurchased shares subject thereto shall become available for other options under the Plan.

3. *Administration of the Plan.* The Board of Directors of the Corporation (the "Board of Directors" or the "Board") shall appoint an Executive Incentive Compensation Committee (the "Committee"), consisting of not less than three of its members, to administer the Plan, none of whom shall be eligible to receive an option under the Plan.

The Board may from time to time remove members from the Committee, and may fill all vacancies in the Committee however created, and may elect one of the members of the Committee as its chairman. The Committee shall hold meetings at such time and place as it may determine. A majority of its members, which shall constitute a quorum, may take all action pursuant to the Plan and may do so without a formal meeting by signing a statement authorizing the action. The Committee may appoint a secretary (who need not be a member of the Committee), may keep minutes of its meetings, and may make such rules and regulations for the conduct of its business as it shall deem advisable.

The Committee shall have full and final authority in its discretion, subject to the provisions of the Plan, to determine the number of shares and purchase price of stock covered by each option, the individuals to whom, and the time or times at which, options shall be granted; to interpret the Plan; to determine the terms and provisions of the respective option agreements (which need not be identical); and to make all other determinations and take all other actions deemed necessary or advisable for the administration of the Plan. All such actions and all determinations shall be conclusive and binding for all purposes and upon all persons.

4. *Eligibility. Factors to be Considered in Granting Options.* Options may be granted under the Plan only to officers and regular employees of the Corporation or its subsidiaries. In selecting the individuals to whom options are to be granted, as well as in determining the number of shares subject to each option, the Committee shall weigh the duties and responsibilities of the individuals being considered, the nature of the services and the accomplishment of each, the value to the Corporation of their services, their present and potential contributions to the success of the Corporation, and such other factors as the Committee shall deem relevant in connection with accomplishing the purpose of the Plan. More than one option may be granted to a single individual.

5. *Terms of Options.* The purchase price of Common Stock covered by each option shall be not less than the fair market price of such stock on the date the option is granted.

A-29132

. The term of [illegible] hereunder shall be [illegible] not exceeding ten years, and shall be subject to such termination [illegible] hereinafter provided each option shall be exercisable in whole or in part [illegible] to such conditions, if any, as the Committee may provide in the option [illegible]

An option granted to the Plan shall be [illegible] the laws of descent and distribution, and an option may be exercised, during only by him.

No option shall be exercisable under and until the Corporation [illegible] had aggregate [illegible] net income after taxes (computed in accordance with practice) not materially changed [illegible] per share on the average number of shares of its Common Stock outstanding during

Except as otherwise specifically provided in paragraph 7, no option shall be exercisable unless the holder thereof shall then be employed by the Corporation or one of its subsidiaries and shall have been so employed continuously since the date the option was granted to him. Nothing in the Plan or any option granted pursuant to the Plan shall confer upon any holder of an option any right with respect to continuation of employment by the Corporation or any subsidiary, nor interfere in any way with the right of the Corporation or any subsidiary to terminate his employment at any time.

6. *Payment for Shares.* Payment for all shares purchased upon the exercise of an option shall be made in full at the time of the exercise thereof. After receipt of the application for the exercise of an option and the written agreement of the holder, the Corporation shall, in the proper case, deliver to the holder a certificate or certificates for the shares purchased upon the exercise of the option, against payment therefor in cash or by certified check or bank draft, or in such other manner as may be permitted by the Committee. The proceeds received from the exercise of options shall be added to the general funds of the Corporation and may be used for any corporate purpose.

7. *Termination of Employment.* If an option shall cease to be exercisable by the holder thereof for any reason, including death, all rights under the option shall terminate. If an option shall cease to be exercisable after the option has become exercisable, the holder thereof may exercise the option at any time within three months after the date on which he ceases to be employed by the Corporation or a subsidiary, but only to the extent that he was entitled to exercise the option at the time of such termination. After the option has become exercisable, the holder thereof may exercise the option at any time within three months after the date on which he ceases to be employed by the Corporation or a subsidiary, but only to the extent that he was entitled to exercise the option at the time of such termination. In the event of the death of the holder of an option while he is employed by the Corporation or a subsidiary, the personal representative of his estate or the person or persons to whom the option shall have been transferred by will or the laws of descent and distribution may exercise the option at any time within three months after the holder's death. Employment will not be considered terminated during any period of absence on account of illness or during any period of absence after the expiration of six months. The Committee may make such provision with respect to leaves of absence as to it appears appropriate and the decision of counsel to the Corporation shall be conclusive as to the status of employment for the purposes of the Internal Revenue Code. Nothing in any option granted pursuant to the Plan shall confer upon any officer or employee of the Corporation or of any of its subsidiaries or shall interfere with the right of the Corporation or any such subsidiary to terminate his employment at any time.

8. *Transferability.* [illegible] of a transferee shall be subject to the [illegible] terms of the Plan and the option. Except as otherwise provided in the option, no option granted under the Plan shall be transferable by the holder thereof otherwise than by will or the laws of descent and distribution, and during the lifetime of the holder of an option the option shall be exercisable only by him. If the holder of an option shall attempt to transfer, assign, pledge or otherwise dispose of such option, or of any right thereunder, except as provided for herein or in the option, or in the event of any attempted execution, attachment, levy or similar process upon the rights or interest hereby conferred, the Committee may terminate such option by notice to the holder thereof and it shall thereupon become null and void and of no further force and effect.

9. *Effect of Change in Capital Structure.* The [illegible] shall make such adjustment as it deems appropriate in the number and kind of shares authorized by the Plan, in the number and kind of shares subject to unexercised options and in the option price per share.

10. [illegible]

# Exhibit B to Vincenti Affidavit



11. *Qualification as Incentive Stock Options.* It is intended that the Plan shall conform to, and that each option granted hereunder shall qualify and be subject to exercise only to the extent that it qualifies as a qualified stock option under the Internal Revenue Code of 1954, as it may be amended from time to time. In the event of amendment of such provisions of the Internal Revenue Code of 1954 the Board of Directors may amend the Plan to conform to any such amendment.

12. *Termination and Amendment of the Plan.* The Board of Directors may terminate the Plan at any time, provided, however, that any such termination shall not affect any options then outstanding under the Plan.

The Board of Directors may make such modifications of the Plan, including without limitation thereto as the Committee shall, with the consent of an optionee, of the terms and conditions of his option, as set forth above, but may not, without further approval of the stockholders of the Corporation, (a) increase the maximum number of shares as to which options may be granted under the Plan, except as provided in paragraph 8, (b) change the manner of determining the minimum option price, (c) extend the period during which options may be exercised, or (d) permit a member of the Committee to receive an option under the Plan, except that nothing herein shall preclude the cancellation by mutual consent of outstanding options and the granting of new ones which qualify as qualified stock options under the Internal Revenue Code of 1954, as it may be amended from time to time.

ATTORNEY'S VERIFICATION

STATE OF NEW YORK
COUNTY OF

The undersigned, being an attorney duly admitted to practice in the courts of the State of New York shows that he is

the attorney(s) of record or an attorney acting as of counsel with the attorney of record for the in the within

action; that he has read the foregoing

knows the contents thereof, that the same is true to his own knowledge, except as to those matters therein stated to be alleged upon information and belief, and that as to those matters he believes them to be true. He further states that the reason this verification is made by him and not by the

grounds of his belief and sources of information as to all matters not stated upon his knowledge are as follows:

The undersigned affirms that the foregoing statements are true, under the penalties of perjury, pursuant to Rule 2106 CPLR.

Signature

Dated: Typed

ATTORNEY'S CERTIFICATION

STATE OF NEW YORK
COUNTY OF

The undersigned attorney certifies pursuant to Section 2105 CPLR that the within has been compared by the undersigned with the original on file in the office of and to be a true and complete copy.

Signature

Dated: Typed

SOUTHERN DISTRICT OF NEW YORK

JACK VALIZER,

Plaintiff,

-against-

I. JOHN BILLERA, et al,

Defendants.

SUMMONS AND COMPLAINT

GARWIN & BRONZAFT

Attorney(s) for Plaintiff

Office and Post Office Address
1501 BROADWAY
NEW YORK, N. Y. 10036
(212) 719-4500

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated, 19

Attorney(s) for

Sir:- Please take notice that the within is a (certified) true copy of a duly entered in the office of the clerk of the within named court on 19

Dated,

Yours, etc.

GARWIN & BRONZAFT

Attorney(s) for

Office and Post Office Address
1501 BROADWAY
NEW YORK, N. Y. 10036

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:- Please take notice that an order

of which the within is a true copy will be presented for settlement to the Hon. one of the judges of the within named Court, at on the day of 19 at M.

Dated,

Yours, etc.

GARWIN & BRONZAFT

Attorney(s) for

Office and Post Office Address
1501 BROADWAY
NEW YORK, N. Y. 10036

To

Attorney(s) for

Exhibit C to Vincenti affi avit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SIDNEY L. GARWIN,

Plaintiff,

-against-

JAMES M. COX, JR., J. LEONARD REINSCH, BARBARA COX ANTHONY, GARNER ANTHONY, ANNE COX CHAMBERS, ROBERT W. CHAMBERS, HOWARD S. KNIFFIN, CARL J. REITH, JOHN H. MAGOON, JR., IVAN ALLEN, JR., MARCUS BARTLETT, FRANK GAITHER, CLIFFORD M. KIRTLAND, JR., RAYMOND J. TUCKER, E. WILLIAM BOHN, H. STEWART CORBETT, JR. and COX BROADCASTING CORPORATION,

Defendants.

Plaintiff, by his attorney, complaining of the defendants, alleges the following on information and belief, except as to paragraphs "1" and "2", which are alleged upon knowledge:

1. (a) Plaintiff is and has been a stockholder of Cox Broadcasting Corporation (hereinafter "Cox") continuously from prior to January 1, 1970.

(b) Plaintiff is a citizen of the State of New York.

2. Plaintiff brings this action derivatively on behalf of Cox.

3. (a) Cox is a corporation organized under the laws of the State of Georgia with its principal place of business in the State of Georgia.

Exhibit C to Vincenti affidavit

(b) The claims alleged herein arise under the Securities Exchange Act of 1934 ("Act") including §10(b) and 14 and under the rules and regulations issued pursuant to said Act, including Rule 10b-5 and under the common law.

(c) The acts and transactions complained of occurred in substantial part within the Southern District of New York.

(d) Jurisdiction of the Court rests upon §27 of the Act and the rules and regulations promulgated under said Act and diversity of citizenship.

(e) Diversity of citizenship jurisdiction is asserted only with respect to defendants who are not citizens of the State of New York.

(f) The defendants, with respect to whom diversity jurisdiction is asserted, are citizens of States other than New York.

(g) The amount in controversy, exclusive of interest and costs, exceeds $10,000.

(h) This suit is not a collusive one to confer upon this Court jurisdiction of an action of which it would not otherwise have jurisdiction.

4. The shares of the common stock of Cox are presently being traded on the New York Stock Exchange, a national securities exchange as defined by the Act.

5. The following individuals hold the following positions with Cox from at least 1970 to the present time:

| Name | Position |
|---|---|
| James M. Cox, Jr. | Chairman of the Board of Directors and a Director |
| J. Leonard Reinsch | President and Director |
| Barbara Cox Anthony | Director |
| Garner Anthony | Director |
| Anne Cox Chambers | Director |
| Robert W. Chambers | Director |
| Howard S. Kniffin | Director |
| Carl J. Reith | Director |
| John H. Magoon, Jr. | Director |
| Ivan Allen, Jr. | Director |
| Marcus Bartlett | Executive Vice President |
| Frank Geither | Executive Vice President |
| Clifford M. Kirtland, Jr. | Executive Vice President, Secretary and Treasurer |
| Raymond J. Tucker | Controller and Assistant Treasurer |
| E. William Bohn | Assistant Secretary |
| H. Stewart Corbett, Jr. | Assistant Treasurer |

6. On March 20, 1964, the Board of Directors of Cox adopted a Qualified Stock Option Plan (hereinafter "Plan I"), which was approved by its stockholders on the same date. Said Plan I provided, among other things, for the grant to officers and employees, of options to purchase an aggregate of 100,000 shares of the common stock of Cox at a price equal to 100% of the fair market value of the stock on the date of the grant; that the options were exercisable from the date of the grant at the rate of 20% per year on a cumulative basis and to the extent unexercised, lapsed five years after the grant; that no options may be granted after ten years elapsed from the adoption of Plan I; that no option may be granted if, after giving effect thereto, the optionee will own 5% or more of the outstanding stock of Cox; that no more than 20,000

shares of Cox stock may be optioned to any one employee; that the options are non-transferable, except upon the death of an option holder; that optionees may exercise an option only while employed by the company or within a specified time thereafter in the event of cessation of said employment; that unless submitted to the stockholders for their approval, no adjustments or reductions of the exercise price of options shall be made in the event of a decline in the market, such as a cancellation of outstanding options and the subsequent regranting of options at a lower price, by modification, extension, or renewal of an option, or by any other means not specifically provided for in the Plan; and that the Plan shall be administered by the Board of Directors.

7. On January 5, 1970, the common stock of Cox was split on a basis of two-for-one. Accordingly, pursuant to the terms of Plan I, the Board of Directors became authorized to issue options on a total of 200,000 shares of the common stock of Cox, the option price was reduced by 50%, and no more than 40,000 shares could be optioned to any one employee.

8. Prior to February 24, 1970, the Board of Directors of Cox granted options to purchase a total of 196,500 shares of Cox common stock to directors, officers and employees. As of that date, unexercised options to purchase 90,500 shares at prices ranging from $17.9375 to $26.125 were outstanding.

9. As of February 24, 1970, the Board of Directors of Cox had granted options on all of the shares available for issuance

Exhibit C to Vincenti affidavit

under Plan I, excepting 3500 shares. Accordingly, as of that date, the Board of Directors of Cox had no authority to issue options covering more than 3500 shares of the common stock of Cox, without the prior approval of shareholders.

10. On September 9, 1970, the Board of Directors of Cox, without prior approval of shareholders, purported to grant to its directors, officers and employees, pursuant to Plan I, so-called alternate options to purchase 90,500 shares of its common stock at $16.81 per share. Said alternate options provided that they could not be exercised until prior outstanding options, having a greater option price and a shorter exercise period, were either exercised in full, or expired by lapse of time, and that to the extent that such prior options were exercised, the number of shares which might be purchased by the exercise of such alternate options would be reduced by the number of shares purchased through the exercise of prior options. The grant of such alternate options violated the express terms of Plan I, in that the purpose thereof was to afford the recipients thereof the opportunity to exercise said options at a price below the exercise price of options previously granted to them under Plan I, without the prior approval of shareholders.

11. The following individual defendants were among the recipients on September 9, 1970 of alternate options to purchase common stock of Cox at $16.81 per share:

| | |
|---|---|
| Reinsch | 20,000 shares |
| Bartlett | 10,000 shares |
| Gaither | 10,000 shares |

12. The names of the other recipients of the balance of alternate options to purchase an aggregate of 50,500 shares, which was granted on September 9, 1970 by the Board of Directors, are unknown to plaintiff at this time.

13. As of September 9, 1970, the Board of Directors of Cox had no power or authority, without the prior approval of stockholders, to grant any options under Plan I in excess of options to purchase 3500 shares of the common stock of Cox. The aforesaid alternate options granted on September 9, 1970 to purchase shares of the common stock of Cox at $16.81 per share are null and void.

14. The alternate options granted to defendant Reinsch are null and void for the additional reason that, prior to September 9, 1970, the Board of Directors of Cox had granted to said defendant options on the maximum number of shares permitted under Plan I to an one employee.

15. Since September, 1970, Cox common stock has sold on the New York Stock Exchange at prices in excess of $45 per share.

16. The reduction of the price at which the options to purchase Cox stock Under Plan I could be exercised by the optionees constituted spoliation and waste of the assets of Cox and constituted a gift by Cox of its assets to said optionees, and particularly to those optionees who were officers and directors of Cox.

17. The defendants, directly and indirectly, made use of the means and instrumentalities of interstate commerce, of the mails, and of the facilities of the New York Stock Exchange in connection with the actions, practices and course of business alleged herein.

18. By the acts and conduct herein alleged, defendants employed devices, schemes and artifices to defraud; made untrue statements of material facts and omitted to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading, and engaged in acts, practices and a course of business which operated and were calculated to operate as a fraud and deceit upon Cox; all in connection with the purchase and sale of securities, to wit, shares of Cox stock, in violation of §10(b) of the Act and Rule 10(b)-5 thereunder.

19. The defendants who were directors of Cox at the time of the transactions alleged herein knew, or should have known, that the granting under Plan I of the alternate options for a total of 90,500 shares of stock at a price of $16.81 per share to officers, directors and employees who held prior options under Plan I to purchase the same number of shares at higher prices, was intended to enable the optionees to acquire Cox shares at grossly inadequate prices in violation of the terms of Plan I.

20. Defendants violated their fiduciary duty to Cox and its shareholders by granting the alternate options to purchase Cox stock at a price of $16.81 per share. Said options were known

[redacted]

21. The Board of Directors of Cox issued proxy statements, dated February 24, 1971 and February 22, 1972 which were false and misleading in the following respects:

(a) Said proxy statements failed to disclose that the Board of Directors had, on September 9, 1970, granted to its directors, officers and employees, purportedly under Plan I, alternate options to purchase 90,500 shares of Cox stock at $16.81 per share, in violation of the terms and provisions of Plan I;

(b) Said proxy statements failed to disclose that as of September 9, 1970, the Board of Directors of Cox had granted options covering all shares available for issuance under Plan I, excepting 3500 shares, and that the Board of Directors had no power to grant options covering shares in excess of 3500 shares;

(c) Said proxy statements failed to disclose that prior to September 9, 1970, the Board of Directors had granted to defendant Reinsch options covering the maximum number of shares which any one employee was entitled to receive under the terms of Plan I and that the issuance of an alternate option to said defendant on September 9, 1970 was a violation of the terms of Plan I.

25. The exact amount of profits realized and realizable by the individual defendants and the other optionees and the exact amount of damages sustained by Cox are presently unknown to plaintiff.

26. Demand on the Board of Directors of Cox to bring this action would be futile for the following reasons:

(a) A majority of the Board of Directors of Cox participated in and had knowledge of and acquiesced in the transactions which are the subject matter of this complaint;

(b) Institution of this action by the Directors would prevent effective prosecution because said Directors would be defendants in this action.

WHEREFORE, plaintiff, on behalf of himself and all others similarly situated, respectfully demands judgment against the defendants as follows:

(a) That the alternate options granted under Plan I to optionees by Cox be declared null and void and that said options be returned to Cox.

(b) That the individual defendants and all optionees who received alternate options to purchase Cox stock be enjoined from exercising said alternate options.

(c) That the individual defendants account to Cox for all profits realized by any of the optionees who received alternate options under Plan I and that defendants account for all losses and damages sustained by Cox as a result of the matters set forth above.

(d) That the plaintiff be allowed the costs and disbursements of this action, including reasonable attorneys' fees and

accountants' fees.

(e) That the plaintiff have such other and further relief as the Court may deem proper.

Milton Paulson
Attorney for plaintiff
Office & P.O. Address
122 East 42nd Street
New York, New York 10017
Tel: (212) OX 7 - 0133

Exhibit C to Vincenti affidavit

STATE OF NEW YORK )
)SS:
COUNTY OF NEW YORK )

SIDNEY L. GARWIN, being duly sworn, deposes and says that deponent is the plaintiff in the within action; that deponent has read the foregoing complaint and knows the contents thereof; that the same are true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

Sworn to before me this
23rd day of March, 1972

Sidney L. Garwin

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JACK WALTZER,

Plaintiff,

-against-

I. JOHN BILLERA, CHARLES E. SELECMAN, HENRY H. FOWLER, CHARLES W. KENNARD, FRED M. KIRBY, HENRY V. KOBIN, CHARLES A. MOORE, WARREN LEE PIERSON, CLARENCE J. PLISKY, PHILIP A. ROTH, H. L. GRACE, HERBERT T. KERR, C. R. LUIGS, ARTHUR S. NICHOLAS and U. S. INDUSTRIES, INC.,

Defendants.

OPINION

#39492

72 Civ 2052 (SJR)

FILED
US DISTRICT COURT
S.D. OF N.Y.
MAY 23 9 42 AM '73

Appearances:

Garwin & Bronzaft, New York, New York, attorneys for plaintiff.

Patterson, Belknap & Webb, New York, New York, attorneys for defendants, I. John Billera, Charles E. Selecman, Henry H. Fowler, Charles W. Kennard, Fred M. Kirby, Henry V. Kobin, Charles A. Moore, Warren Lee Pierson, Clarence J. Plisky, H. L. Grace, Herbert T. Kerr, C. R. Luigs and Arthur S. Nicholas.

Olwine, Connelly, Chase, O'Donnell & Weyher, New York, New York, attorneys for the defendant, U. S. Industries, Inc.

RYAN, District Judge:

Plaintiff and defendants cross move for summary judgment under Rule 56 F.R.C.P. Defendants also move under Rule 12(b) F.R.C.P. to dismiss the complaint for lack of jurisdiction.[1]

This derivative suit, filed on May 12, 1972, alleges that defendants violated common law principles and Sections 10(b) and 14 of the Securities Exchange Act of 1934

[1] Defendants allege that the complaint does not state a claim under Sections 10(b) or 14 of the Securities Exchange Act of 1934 and that this Court lacks diversity jurisdiction since plaintiff and some of the defendants are citizens of the same state.

EXHIBIT "D"

(the "Exchange Act") by causing U. S. Industries, Inc. ("USI") to amend certain qualified stock option agreements granted to officers and employees of USI in violation of the stock option plan.

Defendants are present and former directors of USI. USI, a Delaware corporation with its principal place of business in New York, is a nominal party defendant. Plaintiff is a shareholder of USI.

After a pretrial conference, the parties have entered into a stipulation of facts[2] and have agreed that "this action shall be adjudicated with the same force and effect as if a trial had been held and the...agreed facts and attachments had constituted the evidence at said trial". I am grateful to the attorneys for their cooperation.

Defendants have not filed answers but the parties agree that defendants deny each of the material allegations in the complaint. I will decide this matter as if a trial had been held before me.

FACTS

Neither the USI certificate of incorporation, its By-laws nor Delaware law contain any provision requiring approval for the granting of stock options to officers and employees. However, in order to qualify under the Internal Revenue Code of 1954 a stock option plan must be approved by

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[2] There are 38 separately numbered paragraphs of stipulated facts numbered in numerical order, and some of these paragraphs embody reference to one of the 19 documentary attachments which are attached to and a part of the agreed statement. Reference to the separate paragraphs of the stipulation of facts is made as "State._____".

shareholders.[3] Accordingly, on July 11, 1967, the Board of Directors of USI adopted (State. 7) a Qualified Stock Option Plan ("1967 Plan") within the Internal Revenue Code of 1954 (State. 5), and on July 28, 1967, USI sent a notice of meeting and proxy statement to its shareholders for a Special Meeting of Shareholders to be held on August 29, 1967. The proxy statement described the 1967 Plan and contained a copy thereof (State. 6). On August 29, 1967 the shareholders of USI approved the 1967 Plan. Under the 1967 Plan, 250,000 shares of USI common stock were made available for options. Due to a subsequent stock split, on May 22, 1968, this was adjusted, as provided in the Plan, to 500,000 shares (State. 9).

In pertinent part the 1967 Plan provides:

> "2. Scope of the Plan...If an option shall expire or be terminated for any reason prior to the termination of the Plan without having been exercised in full, the unpurchased shares subject thereto shall become available for other options under the Plan.
>
> 3. Administration of the Plan. The Board of Directors of the Corporation...shall appoint an Executive Incentive Compensation Committee

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3 Section 422(b) of the Internal Revenue Code of 1954 in defining a "qualified stock option" requires that:

> "(1) the option is granted pursuant to a plan which includes the aggregate number of shares which may be issued under options" (See also Treas. Reg. § 1.422-1(b)(3) which makes clear that only the aggregate number of shares to be issued and the class of employees eligible to receive such options requires stockholder approval under Section 422(b).
>
> * * * *
>
> "(3) such option by its terms is not exercisable after the expiration of 5 years from the date such option is granted;"
>
> "(4) . . . the option price is not less than the fair market value of the stock at the time such option is granted;"

(the "Committee") consisting of not less than three of its members, to administer the Plan, none of whom shall be eligible to receive an option under the Plan.

The Committee shall have full and final authority in its discretion, subject to the provisions of the Plan, to determine the number of shares and purchase price of stock covered by each option, the individuals to whom, and the time or times at which options shall be granted; to interpret the Plan; to determine the terms and provisions of the respective option agreements, which need not be identical; and to make all other determination and take all other action deemed necessary or advisable for the administration of the Plan.

5. Terms of Options. The purchase price of Common Stock covered by each option shall not be less than the fair market value of such stock on the date the option is granted.

The term of each option granted hereunder shall be for such period as the Committee shall determine not exceeding five years, and shall be subject to earlier termination as hereinafter provided.

9. When Plan Becomes Effective. The Plan shall become effective upon its approval by the holders of a majority of interests of the voting stock of the Corporation voting in person or by proxy at a duly held stockholders' meeting....

12. Termination and Amendment of the Plan. The Board of Directors may terminate the Plan at any time, provided, however, that any such termination shall not affect any options then outstanding under the Plan.

The Board of Directors may make such modifications of the Plan, including withdrawing administration thereof from the Committee, and, with the consent of an optionee, of the terms and conditions of his option, as it shall deem advisable, but may not, without further approval of the stockholders of the Corporation (a) increase the maximum number of shares as to which options may be granted under the Plan...(b) change the manner of determining the minimum option price, (c) extend the period during which options may be exercised..."

Pursuant to the 1967 Plan, the Committee during 1968, 1969 and early 1970 granted to approximately 383 officers and employees of USI five-year options to purchase an aggregate of approximately 421,676 shares of USI common stock at prices equal to the market value of the shares on the date of grant. These prices ranged from $20.50 to $34.50 a share. (State. 10) Prior to July 16, 1970, eight defendants were granted options for a total of 88,700 shares (State. 13).

On March 14, 1969, USI sent to all of its Shareholders a notice of meeting and proxy statement for its 1969 Annual Meeting. The proxy statement contained the following at page 9:

> "The Corporation has granted options to purchase its common stock to officers and directors and employees as indicated on page 6 hereof pursuant to stock option plans previously approved by shareholders. The maximum number of shares with respect to which options may be granted in the future under these plans is 81,500 shares." (State. 11)

On February 20, 1970, the Board adopted another qualified stock option Plan (the "1970 Plan"). In a proxy statement, dated March 20, 1970, USI sought, among other things:

> "to consider and act upon a proposal to approve a stock option plan authorizing the granting of options to purchase not in excess of 500,000 shares of the Corporation's Common Stock. ."

This proxy statement stated, at page 8:

> "The Corporation has previously granted options to purchase its common stock to officers and directors and employees pursuant to stock option plans previously approved by shareholders . . The maximum number of shares with respect to which options may be granted in the future under these plans is 81,158 shares."

On April 16, 1970, USI shareholders approved the 1970 Plan which was also a "qualified" plan within the meaning of the Internal Revenue Code of 1954. Under that plan, an additional 500,000 shares of USI common stock were made available for options. The terms and conditions of the plan were substantially identical to the 1967 Plan. No options have been granted under the 1970 Plan (State. 12).

As noted above, options were granted, pursuant to the 1967 Plan, at prices ranging between $20.50 and $34.50 per share. By July 1970, however, the price of USI common stock had declined to about $12 per share.

On July 16, 1970, management submitted a proposal to the Committee with respect to employee stock options stating that the fact that the option prices were so much above the current market price negated the morale and incentive objectives of the stock option plans. It was proposed that the Committee authorize the amendment of all of USI's outstanding stock option agreements granted subsequent to January 1, 1968 to provide that each optionee would have the right to exercise the option, on the basis of the current market value of USI common stock, during the period between the date on which the option would have expired according to its original terms and July 16, 1975 (State. 17, Attachment 7).

On July 16, 1970, the Committee held a meeting at which the management proposal was considered. For the reasons set forth in the management proposal, the Committee authorized the amendment of all stock option agreements entered into after January 1, 1968, in accordance with the

management proposal (State. 18, Attachment 8). On July 16, 1970, the fair market value of USI common stock was $12 per share (State. 22).

The Committee's action was reported to the Board at its meeting on July 16, 1970. No action of any kind was requested of or taken by the Board with respect to the Committee's action (State. 19).

USI entered into an agreement with each of the approximately 383 USI employees implementing the July 16, 1970 action of the Committee. The new agreements provided that the stock option agreement entered into between the employee and USI, pursuant to the 1967 Plan, was "amended to give...the further right at any time or in part from time to time during the period from the expiration date of the option as originally provided in the Agreement through July 15, 1975 to purchase a number of shares of common stock equal to the number of shares optioned by the terms of the Agreement, less the number of any shares purchased thereunder prior to such original expiration date, at a price per share of $12.00." (State. 21, Attachment 10). None of the option rights granted by the Committee on July 16, 1970 became exercisable until January 1973 at the earliest and the bulk do not become exercisable until January 1974, the dates when the five-year duration of the original options granted pursuant to the 1967 Plan would expire (State. 21).

Stockholder approval of the Committee's action on July 16, 1970 was neither sought nor obtained.

On March 19, 1971, USI sent to all of its shareholders a notice of meeting and proxy statement for its Annual Meeting. The proxy statement contained the following description with respect to the foregoing action of the Committee:

> On July 16, 1970, the Corporation amended all outstanding employee stock option agreements covering options granted after January 1, 1968 to grant the further right to exercise options for the same number of shares (less the number of shares, if any, acquired upon exercise of the original option) at $12 per share, the fair market value on July 16, 1970, during the period between the expiration of the five-year term under the original option contract and July 15, 1975. As a result of this action option agreements for purchase of the following amounts of stock were so amended: Mr. Billera, 27,000 shares; Mr. Selecman, 11,000 shares; Mr. Grace, 7,800 shares; Mr. Kerr, 9,000 shares; Mr. Kobin, 12,000 shares; Mr. Plisky, 17,000 shares; and officers and directors as a group, 124,550 shares. Under the terms of the amendment no options may be exercised at the $12 price prior to January 1973. The prices under the original stock option agreements are reflected in the table below. (State. 27, Attachment 14).

On March 15, 1972, USI sent to all of its shareholders a notice of meeting and proxy statement for its 1972 Annual Meeting. The proxy statement described for each officer and director of USI the number of shares subject to unexercised options held as of March 7, 1972, including the option rights granted in 1970 (State. 29, Attachment 15).

Subsequent to July 16, 1970, USI stock increased in value and plaintiff asserts at one point reached $29 per share. As of November 10, 1972, USI common stock was selling for approximately $21 per share (State. 23). On April 23, 1971, defendant Henry V. Kobin exercised one of his original

Exhibit D to Vincenti affidavit

options under the 1967 Plan for 5,000 shares at $25.15625 per share. (State. 13). Subsequent to July 16, 1970, no other options were issued under the 1967 Plan.

DISCUSSION

Plaintiff alleges that the amendment of the 1967 Plan was null and void as not being countenanced by the plan, that individual defendants were unjustly enriched by reason of the amendment of the 1967 Plan, that the amendment constituted spoliation and waste of the assets of USI, that it constituted a device, scheme or artifice to defraud in violation of the Exchange Act, and that the proxy statements of March 19, 1971 and March 15, 1972 violated Section 14 of the Exchange Act. Defendants assert that the 1967 Plan amendment was countenanced by the language of the plan, but that even if it were not, the complaint should be dismissed since no violation of Sections 10(b) or 14 of the Exchange Act has been proven and there is no diversity jurisdiction since plaintiff and some of the defendants are citizens of the same state.

According to defendants, the 1967 Plan permits the granting of consecutive options on the same shares to the same individual. In other words, defendants assert that under the plan USI could grant an option on 10 shares of USI common stock to employee X to be exercised within five years

and at a subsequent date, before the termination of the five years while the option was still effective, grant another option on the same 10 shares to employee X for a five-year period but to be exercised between the date of the expiration of the first five-year period and the expiration of the second five year period. Examination of the language of the 1967 plan indicates that the above interpretation is erroneous. Paragraph 2 of the plan provides that:

> "If an option shall expire or be terminated for any reason prior to the termination of the Plan without having been exercised in full, the unpurchased shares subject thereto shall become available for other options under the Plan." (emphasis added)

In other words, the language is clear that a new option shall not be granted with respect to particular shares, which are already the subject of an option, until the first option has expired or been terminated. Accordingly, under the Plan, the July 16, 1970, amendments, whereby new options were granted with respect to particular shares already subject to existing options, were invalid. The fact that the new options could not be exercised until after the termination of the existing options does not change this analysis. The language of paragraph 2 prohibits the granting of options with respect to shares subject to existing options.

It is true that under the By-laws and Certificate of Incorporation of USI, stockholder approval is not required to institute a stock option plan. Nevertheless, USI included this language in the 1967 Plan and submitted it for approval to its stockholders. Accordingly, the management of USI and the Executive Incentive Compensation Committee were

not justified in amending the 1967 Plan in derogation of the language of Paragraph 2 without obtaining shareholder approval. Gottlieb v. Heyden Chemical Corp., 33 Del. Ch. 82, 90 A.2d 660 (1952); Winkelman v. General Motors Corp., 44 F.Supp. 960 (S.D.N.Y., 1942).

Defendants assert, however, that on July 16, 1970, the optionees and USI could have agreed to terminate the existing 1967 option agreements and then could have entered into new option agreements, or the Committee could have issued new stock options under the 1970 Plan.

This is true, but both of these alternatives have disadvantages from the viewpoint of management. The Internal Revenue Code of 1954 provides that a person must exercise all options granted to him at a higher price before he can exercise an option at a lower price. If an option is cancelled and another option issued at a lower price, the second option cannot be exercised until the first option would have expired. In other words, if, in July 1970, USI had agreed with the optionees to cancel their existing options under the 1967 Plan and to issue them new options at the lower market price, the new options could not have been exercised until after the old options would have expired. Consequently, between July 1970 and January 1973 or 1974 USI employees would not have been able to exercise any options and an optionee who left the company during this hiatus would be deprived of all of his options.[4] Furthermore, USI would have had to

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[4] The 1967 Plan provided that if an optionee left USI he could exercise his options within 90 days of his leaving the Company. As noted supra, defendant Henry V. Kobin retired from USI on January 31, 1971, but on April 23, 1971, exercised an option, under the 1967 Plan, for 5,000 shares (State. 13).

explain to each optionee why he should agree to terminate his options which would have entailed extended discussions.

If in July 1970, USI had not modified the 1967 Plan, but had simply issued an equivalent number of options under the 1970 Plan, until January 1973, it would have only had available about 160,000 shares upon which it could issue additional options[5] and USI shareholders might be reluctant to authorize another stock option plan when the company had issued options on 840,000 shares within a three year period. Furthermore, the Internal Revenue Code had been amended in 1969 *** and regulations dealing with tax preferences were not issued until December, 1970. In July 1970, it was not certain that stock options issued under the 1970 Plan would be treated as favorably under the Internal Revenue Code as options issued under the 1967 Plan.

It is clear that it was more advantageous from the viewpoint of management to amend the 1967 Plan.

In spite of the fact that the amendments of the 1967 Plan were not countenanced by it and are void, the amendments do not violate Sections 14(a) or 10(b) of the Exchange Act.

(1) Plaintiff argues that USI proxy statements of March 19, 1971 and March 15, 1972 violate Section 14(a) because they did not state that the amendments violated the 1967 Plan. Rule 14(a)-9 of the Securities Exchange Commission prohibits proxy solicitations "containing any statement which...is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading...".

5 The 1967 Plan (after the stock split) and the 1970 Plan each made available 500,000 shares for options. About 820,000 shares had been issued under the 1967 Plan.

*** Tax Reform Act of 1969

Exhibit D to Vincenti affidavit

The proxy statements described the amendments of the 1967 Plan. They disclosed the effects of the amendments on the option agreements as well as the exercise prices of the old options and the exercise prices of the new options. In short, there was no false or misleading statement in the proxy statements. The fact that they did not state that the amendments violated the 1967 Plan does not constitute a violation of Section 14(a) of the Exchange Act. Laurenzano v. Einbender, 264 F.Supp. 356, 361 (E.D.N.Y., 1966), aff'd 448 F.2d 1 (1971).

Likewise, defendants' activities in amending the 1967 Plan do not constitute a violation of Section 10(b) of the Exchange Act or Rule 10(b)(5). The agreed facts and attachments which would constitute the evidence at trial do not show "deceit, withhold information or misstatement of material fact." O'Neill v. Maytag 339 F.2d 764, 767 (C. A. 2, 1964). USI and defendants at all times openly and completely revealed the amendments to the 1967 Plan and the additional options granted thereunder. The facts do not indicate that any of the individual defendants acted intentionally contrary to the provisions of the 1967 Plan with the knowledge that the amendments violated said plan nor that they engaged in a fraudulent scheme.[6] In fact, it is defendants' position that the amendments do not violate the 1967 Plan and they still continue to so assert. This is a different situation from the facts in Kaplan v. Newman, et al. CCH. Fed. Sec. L. Rep. (1970-1971 Decs.) para. 93, 134 where the Court found that directors had issued options at below the market price with knowledge of the actual market price.

6 However, a pre-trial motion to dismiss the complaint would fail since the complaint alleges sufficient facts from which plaintiff might have been able to prove that the individual defendants did authorize and/or permit the 1967 Plan to be amended as part of a fraudulent or deceitful scheme.

What is involved here is the breach of common law fiduciary duties where the breach does not involve deception. Section "10(b) [does] not seek to regulate transactions which constitute no more than internal corporation mismanagement." Supt. of Insurance v. Bankers L. & C. Co. 404 U.S. 6, 12 (1971); Birnbaum v. Newport Steel, 193 F.2d 461, 464, (C.A. 2, 1952), cert. den. 343 U.S. 956 (1952).

There is no diversity jurisdiction since some of the defendants and plaintiff are citizens of the same state. Strawbridge v. Curtiss, 3 Cranch (7 U.S.) 267, 2 L. Ed. 435 (1806). Nevertheless, I find that even absent diversity jurisdiction, this Court should entertain plaintiff's state law claim involving corporate mismanagement and breach of fiduciary duty to shareholders. These motions are more than "the opening round of pleadings and motions." O'Neill v. Maytag, supra, at 767. Rather, as stated above, the parties have agreed that "this action shall be adjudicated with the same force and effect as if a trial had been held and the... agreed facts and attachments had constituted the evidence at said trial." The state and federal claims asserted by plaintiff arise from the same nucleus of operative facts and the federal claims pursuant to Section 10(b) of the Exchange Act and Rule 10(b)(5) thereunder would have survived a pretrial motion to dismiss the complaint. Therefore, this Court has power to entertain plaintiff's state and federal claims and the discretion to entertain the state claim where after trial the federal claims have been dismissed. United Mine Workers v. Gibbs, 383 U.S. 715, 725-728 (1966). In the interests of judicial economy and convenience, it makes little sense to direct plaintiff to the state court at this late stage.

I hold that the amendments to the 1967 Plan entered into by USI and the optionees were not countenanced by the 1967 Plan and are void.

It follows then that defendants' motion to dismiss under Rule 12(b) F.R.C.P. for lack of jurisdiction must be denied, and that defendants' motion for summary judgment of dismissal under Rule 56 F.R.C.P. must be granted to the extent only that it alleges no claim predicated upon alleged violations of Sections 10(b) and 14 of the Securities Exchange Act of 1934, and denied as to the claim asserted under common law principles and state law.

Let an appropriate order consistent with the foregoing be submitted on 5 days notice of settlement. I find no just cause for delaying the immediate entry of a partial judgment dismissing plaintiff's claim based upon alleged violations of Section 10(b) and 14 of the Securities Act of 1934, and I direct the Clerk to enter such judgment forthwith. I find too that a controlling question of law as to which there is substantial ground for difference of opinion is involved by the denial of defendants' motion to dismiss all claims made by the complaint herein. I therefore, will certify this matter to the Court of Appeals, Second Circuit for intermediate appeal pursuant to Section 1292(b) Title 28 U.S.C. I direct that provision for this Certificate shall be set forth in the order to be settled.

May , 1973

SYLVESTER J. RYAN

Exhibit F to Vincenti affidavit

VINCENTI & SCHICKLER
COUNSELLORS AT LAW

ARNOLD B. SCHICKLER
VITO R. VINCENTI

225 Broadway
New York, N.Y. 10007

December 21, 1973

Hon. Lawrence W. Pierce
United States District Judge
United States District Court
Foley Square
New York, New York 10007

Re: Jacoby vs. Vornado, et. al.
Civil Action No. 72 Civ. 5442

Dear Judge Pierce:

We are writing herewith in an attempt to assist your Honor in rendering a decision within the time limitation that has been imposed upon Vornado as a result of the Cost of Living Counsel's rulings as set forth in our letter to you of December 3rd.

We have already pointed out to you that the determination by the Court of this law suit prior to January 15, 1974, is of greater importance to the corporation, its hundreds of employees and thousands of shareholders than that either the stock option plan adopted by the corporation in 1968 or the act of the corporation in granting tandem options under that plan in January 1970, be upheld. The institution of this law suit has worked an uncertainty as to the status of the stock optionsgranted to the many key employees of the corporation and has affected their morale and that of its shareholders. It is, accordingly, of the greatest importance to the corporation, and we respectfully urge, that the matter and the uncertainties be resolved so that the corporation may act in the light of the Court's decision and provide its key employees with solid option rights free of any uncertainties.

Because of these exigencies, the corporation is prepared to accept a decision by your Honor based upon the ruling in Waltzer v. Billera (USI) C.C.H. Fed. Sec. L. Rep. ¶ 94,011, S.D.N.Y. May 23, 1973, per Judge Ryan, that the act of the corporation in

EXHIBIT "F"

VINCENTI & SCHICKLER

Hon. Lawrence W. Pierce

December 21, 1973
p. 2

January 1970 was a technical violation of the corporation's 1968 stock option plan and therefore, technically, in violation of the State law of Delaware. Of course, we emphasize that this is in no way a concession by the defendants that there has been any violation of any of the statutes or regulations under the Securities Exchange Act of 1934. On the contrary, we believe the law is undeniably clear, as we have underscored in Points III and IV of defendants' memorandum, that based upon the cases cited therein and especially the recent decisions in the Southern District in the USI case and in Garwin v. Cox, C.C.H. Fed. Sec. L. Rep. ¶ 94,193 S.D.N.Y., October 23, 1973, per Judge Metzner, that under the undisputed facts herein, there can be no violation of any of the applicable provisions of the 1934 Act.

Moreover, we stress that the defendants' statement as to their willingness to accept such a decision is not made with any intent to waive any of their rights concerning the question of counsel fees or other litigation expenses being awarded to the plaintiff herein. It is our position that plaintiff is not entitled under all of the circumstances herein to any of such fees and expenses and we request that this question be referred to a referee or magistrate for determination after the Court's determination of the substance of this matter.

We hope and trust that the foregoing will be of assistance to the Court in achieving a speedy determination of the substantive question in this law suit.

Respectfully yours,

VINCENTI & SCHICKLER

By
Vito R. Vincenti

VRV:bo
c.c. Garwin & Bronzaft, Esqs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER JACOBY,

Plaintiff,

-against-

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendants.

72 Civ. 5442 (LWP)

REPORT AND RECOMMENDATION

The above action has been referred for hearing and recommendation as to an award of attorneys' fees to plaintiff. Plaintiff instituted this stockholder's derivative action as a shareholder of Vornado, Inc. The action alleged that that defendant's officers and directors violated the securities laws and an existing stock option plan approved by stockholders by amending the plan (without stockholder approval) to allow "tandem options" at far lower prices than that at which the original stock options had been issued. The defendants claimed that the existing stock option plan had become valueless as an employee incentive because of a continuing decline in the market value of the corporation's stock.

In a seventeen page opinion filed on January 16, 1975, District Judge Lawrence W. Pierce found that the amendment violated the original qualified stock option plan, so

that all options granted pursuant to it were null and void, but that the defendants had not violated the securities laws. In arriving at this conclusion, Judge Pierce relied heavily upon the decision of Senior (formerly "Chief") Judge Sylvester J. Ryan of this district in Waltzer v. Billera, C.C.H. Fed. Sec. L. Rep. §94,011 (S.D.N.Y. 1973). The Waltzer case was brought by the same counsel as represents this plaintiff, and although it involved a different corporation, and a different stock plan, was, in all material respects, identical to this case.

After the question of attorneys' fees had been referred to the undersigned, Judge Ryan, in the Waltzer case, denied an application for an allowance of $62,500.00 fees sought by plaintiff's counsel, although not opposed by counsel for the defendants. In a two-page endorsement dated January 16, 1975 (apparently unreported), Judge Ryan concluded that, while it was not necessary to show the creation of a cash fund as a result of counsel's efforts, a substantial benefit must have been conferred on the corporate defendant and that the invalidation of the stock option agreement, " . . . while perhaps salutory as a deterrent to similar future activity, has resulted in a supposed benefit of so uncertain a nature as to preclude compensation by the corporation."

Plaintiff's attorneys appealed Judge Ryan's decision as to the disallowance of their fee. The case was called for preliminary conference before Court of Appeals Staff Counsel

Fensterstock. A settlement of the appeal was negotiated in which the corporation agreed to pay plaintiff's counsel $42,000 in legal fees in return for the dismissal of the appeal. Mr. Fensterstock had this settlement and dismissal of the appeal "So Ordered" by Chief Judge Irving R. Kaufman.

The defendants point out that the circumstances for denying attorneys' fees are as strong (if not stronger) in this case than they were in Waltzer. (In that case some of the options had been exercised and the cancellation of certain of the option rights were not agreed to by the optionees, as occurred here.) The defendants argue that since the attorneys for the plaintiff were the same as in Waltzer, and the issues the same, Judge Ryan's decision must be followed and the attorneys' fees denied.

Plaintiff's counsel, on the other hand, has argued that the approval of Chief Judge Kaufman to the settlement must have been on the merits, since court approval of such fees is required. This, they argue, is in effect an Appellate finding that the cancellations of the options had conferred substantial benefits on the corporation. They argue that any other interpretation of the order would place the Circuit Court of Appeals in the position of approving an unwarranted fee. Defendants respond that Chief Judge Kaufman, sitting alone, could not have rendered such an approval, which could have required a determination by the requisite number of the Judges of the Court of Appeals, and that if his action is so

interpreted, it would constitute an excess of powers provided to him by law. 28 U.S.C. 46; Butler v. Eaton, 141 U.S. 240 (1891).

There clearly exists an extremely fascinating question concerning the precedential effect of the "settlement" of appeals. However, caught between disagreeing with the substantive decision of Senior Judge Ryan, or the procedural actions of Chief Judge Kaufman, discretion indicates that the only course is to ignore the Waltzer case entirely and start anew, as if it had never occurred.

It is a well established rule that American courts, unlike those in England, do not tax as costs the prevailing party's attorneys' fees. However, as with all sweeping statements, exceptions have crept in. Of importance here is the "common fund" category where a plaintiff's actions result in a fund or benefit accruing to all the members of the class, so that the failure to allow attorneys' fees would be inequitable. See "Allocation of Attorney's Fees after Mills v. Electric Auto-Lite Co.", 38 Univ. of Chicago L. Rev. 416 (1971). The landmark case in this area is Mills v. Electric Auto-Lite Co., 390 U.S. 375 (1970), a stockholders' action which sought to dissolve a merger precipitated by materially misleading proxy statements. Since the court's review was limited to the issue of liability, a grant of attorney's fees might appear anomalous if made prior to a final resolution awarding a "com-mon

fund". However, the court granted reimbursement recognizing the "common fund" exception, saying:

> "This development has been most pronounced in shareholders' derivative actions, where the courts increasingly have recognized that the expenses incurred by one shareholder in the vindication of a corporate right of action can be spread among all shareholders through an award against the corporation, regardless of whether an actual money recovery has been obtained in the corporation's favor." Id., at 393-4.

The Court then approved the "substantial benefit" test as it quoted from Bosch v. Meeker Cooperative Light and Power, 257 Minn. 362, 101 N.W. 2d 423 (1960):

> "Where an action by a stockholder results in a substantial benefit to a corporation he should recover his costs and expenses . . . [A] substantial benefit must be something more than technical in its consequence and be one that accomplishes a result which corrects or prevents an abuse which would be prejudicial to the rights and interests of the corporation or affect the enjoyment or protection of an essential right to the stockholder's interest." 396 U.S. at 396.

Very recently, in Alyeska Pipeline Service Co. v. Wilderness Society, __U.S.__, Slip Opin. 73-1977, decided May 12, 1975, the Supreme Court disallowed award of attorney's fees in a "public interest" suit to enjoin the construction of the Alaskan oil pipeline. However, the Court, citing Mills v. Electric Auto-Lite Co., supra, reaffirmed the "common fund" exception and noted that:

> "These exceptions are unquestionably assertions of inherent equity in the courts to allow attorney's fees in particular situations unless forbidden by Congress, but none of the exceptions is involved here." Id., p. 19.

A grant of attorney's fees is discretionary and based upon equitable principles. The Court in Angoff v. Goldfine, 270 F. 2d 185, 188-89 (1st Cir. 1959) catalogued many of the criteria:

> "It is conceded by the parties and too well settled to require citation of the authorities that in awarding fees to counsel and others in stockholders' derivative actions the district courts are to be governed by the standard of reasonableness with reference to the particular facts of each case. Nor is there any dispute that the following factors are to be carefully considered and weighed in fixing the amounts of compensation to be awarded in cases of this sort. These factors are: the amount recovered for the corporation; the time fairly required to be spent on the case; the skill required and employed on the case with reference to the intricacy, novelty and complexity of issues; the difficulty encountered in unearthing the facts and the skill and resourcefulness of opposing counsel; the prevailing rate of compensation for those with the skill, experience and standing of the attorneys, [illegible] ants or others involved; the contingent nature of the fees, with the accompanying risk of wasting hours of work, overhead and expenses (for it is clearly established that compensation is awarded only in the event of success); and the benefits accruing to the public from suits such as this. And these criteria have frequently been spelled out by the courts."

The parties are in general agreement that the foregoing factors govern. Defendant does not dispute the fact that plaintiff's counsel spent 273 hours in the prosecution of the case; that their fee was to be contingent upon success and the awarding by the Court of such a fee; that they are highly skilled in these derivative actions; and, needless to say, that they met

continual and determined opposition from experienced counsel. There is some dispute concerning the novelty and complexity of the issues. At the time the action was commenced, the issue was novel. However, Judge Ryan's decision in the Waltzer case preceded the pre-trial hearings in this matter and defendants had agreed, by that point, to accept the Waltzer rationale.

In addition, defendants point out that liability was premised solely upon the narrow ground that amendments to the options were not contemplated under the original plan, finding no violations of the Securities and Exchange Act of 1934.

The essential basis of dispute concerning an allowance of attorney's fees, however, is whether a benefit to the corporation accrued from this suit. The defendants contend that the realities of the market from the time the options became exercisable until the time of expiration, rendered the possibility of loss moot, and that, in fact, none of the options were or would have been exercised. Therefore, in weighing the factors governing attorney's fees, the central issue is the speculative nature of the threatened harm (due to the fact that the price of the stock during the relevant period when the amended options might have been exercised had fallen well below the option price) and the lack of actual resulting harm. The defendants claim that plaintiff conferred only a technical or insubstantial benefit, with hindsight revealing the new options' worthlessness, since the price continued to decline. At the time the action was commenced, the options

had a value to the holders just as, before a race, a bet on a long shot has some value. Whether the value was as much as a dollar a share, or as little as a penny, is a matter of individual estimate, but it is clear that there was some value.

In Murphy v. North American Light and Power, 33 F. Supp. 567, 570-71 (S.D.N.Y. 1940) Judge Woolsey stated that fees in derivative actions "should not be niggardly for appetite for effort in corporate therapeutics ... should be encouraged." While the harm averted was speculative (and the action eventually proved unnecessary), it had an actual value at the time and there was a therapeutic value to voiding options which were not authorized by its stockholders. Therefore, the fact that no precise monetary value can be placed upon the benefit produced by plaintiff's action does not render the benefit insubstantial, nor does the resulting absence of loss to the corporation create a merely technical benefit. (See Sprague v. Ticonic Nat. Bank, 307 U.S. 161 (1939) where the stare decisis effect of plaintiff's lawsuit was found to provide a sufficient basis for reimbursement.)

Although the presence of actual harm or the creation of a definite fund are not prerequisites to plaintiff's right to reimbursement, their absence must affect the size of the award. Considering that the 168,000 cancelled options had a limited value at the time of the commencement of the suit, it would appear that a legal fee of only $10,000 plus disbursements of $211.44, should be awarded. While this fee is

substantially less than the time expended by the attorneys would otherwise warrant, it is a fair reflection of the value of the benefit conferred on the corporation.

The Supreme Court, in Alyeska Pipeline Service Co. v. Wilderness Society, supra, at p. 19, indicated that a Federal Court sitting in a diversity case must apply state law concerning attorney's fees unless it conflicts with a federal statute. Since the instant plaintiff's statutory grounds of Securities Law violations were disallowed, and diversity jurisdiction underlay the dispositive claim, this issue must be considered.

Vornado is a Delaware corporation having its principal place of business in New York. The initial determination of which state's law applies is unnecessary, since the law of both states follows the federal rule. Rosenthal v. Burry Biscuit, 209 A. 2d 459 (Ct. of Chancery of Delaware, 1949) recognized a successful plaintiff's right in a derivative action to an attorney's fee. (See also McDonnell Douglas Corp. v. Pallet, 310 A. 2d 635 (Del. Supr. 1973), which, like the federal rule, allowed an attorney's fee even though defendant's action had mooted the claim thus preventing the creation of a fund.) Similarly, in New York, reimbursement is allowed in derivative actions. Marine Midland Trust v. Forty Wall St. Corp., 213 N.Y.S. 2d 689 (App. Div. 1st, 1961). (See also, Abrams v. Textile Realty Corp., 97 N.Y.S. 2d 492 (Sup. Ct. N.Y. 1949), where fees were allowed regardless of whether a fund

was created.)

Therefore, since the law of the states of Delaware and New York is in accord with federal policy, this court is free to award attorney's fees in the instant action.

Respectfully,

Gerard L. Goettel
United States Magistrate

Dated: New York, N.Y.,
June 25, 1975.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - - - - -x

ESTHER JACOBY,

Plaintiff,

-against-

72 Civ. 5442 (LWP)

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

AFFIDAVIT

Defendants.

- - - - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

BERTRAM BRONZAFT, being duly sworn, deposes and says:

That I am a partner in the law firm of Garwin & Bronzaft, attorneys for plaintiff Esther Jacoby in the above-captioned action and am fully familiar with the facts herein.

Deponent makes this affidavit in support of the confirmation of Magistrate Gerard L. Goettel's Report and Recommendation, dated June 25, 1975, insofar as it holds that plaintiff's counsel be awarded fees in the instant action, and to disaffirm that part of Magistrate Goettel's Report wherein he recommends that a legal fee of Ten Thousand ($10,000) Dollars be awarded rather than the Forty Thousand ($40,000) Dollars requested by plaintiff. Plaintiff requests that the Court award plaintiff the Forty Thousand ($40,000) Dollars in fees requested in her fee application, in lieu of the Magistrate's Ten Thousand ($10,000) Dollars fee award recommendation.

In connection with the hearing held before Magistrate Goettel on May 29, 1975, plaintiff submitted deponent's affidavit sworn to March 27, 1975, together with a memorandum of law, both in support of an award of Forty Thousand ($40,000) Dollars for plaintiff's attorneys and accountants for the services they rendered in the successful prosecution of this action.

The above-described papers are, of course, before this Court, as is the entire file in the case, and this affidavit and plaintiff's accompanying memorandum are intended merely to supplement and expand upon the contentions set forth in said papers.

After plaintiff filed her papers with Magistrate Goettel's office in late March 1975, deponent, through a combination of diligence and chance, came upon a derivative action, the resolution of which and the attorneys' fee awarded therein, is strongly supportive of plaintiff's fee request in this action.

The case, Rafal v. Geneen, reported at CCH Fed. Sec. L. Rep. ¶93,505 ('72-'73 Decisions) (E.D.Pa. 1972), appended hereto as Exhibit "A", concerns itself with a plaintiff-stockholder who moved to enjoin the Annual Meeting of International Telephone and Telegraph Company because the proxy material sent to shareholders in connection with the election of IT & T's Board of Directors was misleading. The Court agreed with the plaintiff's contention that IT & T's proxy material was violative of §14(a) of the Securities Exchange Act of 1934, because it failed to inform the stockholders that three of the nominees were then defendants in §16(b) actions.

The Court enjoined voting on the three nominees in question, permitted voting to proceed on the balance of the slate of

nominees and required IT & T to mail additional proxy material, including information as to the §16(b) suits, concerning the three nominees before they again could be candidates for election to IT & T's Board of Directors.

Deponent telephoned Leonard Barrack, a member of the noted Philadelphia derivative and class action firm of David Berger, P.A., the firm that represented the plaintiff in the Rafal action, who informed the deponent that the Court had awarded his firm $55,000 in legal fees plus out-of-pocket expenses of $1,862.49 in compensation for their services in Rafal.

Mr. Barrack informed deponent that much of the time his firm spent on the matter was accumulated over a two day period in the Courtroom obtaining the injunction. A conformed copy of the order awarding plaintiff's counsel fees and expenses in the Rafal matter is appended hereto as Exhibit "B".

Deponent believes that the Rafal and Jacoby matters are analogous in that both derivative suits succeeded in their professed objectives after diligent prosecution and both conferred substantial benefits which were not readily measurable in monetary terms.

Deponent does not believe it too presumptuous to suggest that the benefits conferred on Vornado in the Jacoby action in voiding 168,000 options illegally granted was of greater import than the benefits, though patent, realized by IT & T in Rafal.

It is thus particularly ironic, that counsel and accountants in Jacoby, should Magistrate Goettel's recommendation be followed, will be awarded Ten Thousand ($10,000) Dollars, whereas

counsel in Rafal received Fifty Five Thousand ($55,000) Dollars, although the time expended in the prosecution of Rafal was considerably less than the time expended in the Jacoby prosecution (328 hours).

Further arguments in support of plaintiff's position that her attorneys and accountants should be awarded fees in the amount of Forty Thousand ($40,000) Dollars are contained in the accompanying memorandum of law.

Deponent respectfully requests that the Court confirm Magistrate Goettel's Report and Recommendation insofar as it holds that plaintiff's counsel are entitled to attorneys fees but that it disaffirm the Ten Thousand ($10,000) Dollars in fees that the Magistrate recommends, and in lieu thereof, award plaintiff's counsel and accountants the Forty Thousand ($40,000) Dollars she requested for her attorneys and accountants in her fee application.

Bertram Bronzaft

Sworn to before me this
19th day of September, 1975.

Notary Public, State of New York
Qualified in Nassau County
Commission Expires March 30, 1976

he contends that Witt is liable because he personally participated in the transaction. Under Section 517.21, Witt must have personally participated or aided in making the sale; the findings of the district court completely negate this possibility. Alternatively, Witt would have had to have been Perry's agent, which he clearly was not.

Finally, Henderson argues that Hayden, Stone is absolutely liable for the acts of Perry notwithstanding the fact that he was acting outside the scope of his authority or without the knowledge of Hayden, Stone. This point is without merit since Hayden, Stone was clearly not "the person making the sale" within the meaning of Section 517.21, Rule 330-3.05 of the Florida Securities Commission Rules does not affect this result.

The judgment of the district court as to Perry, Pope, and Whittaker is reversed and remanded with directions to enter judgment in behalf of Henderson against Perry, Whittaker and Pope. The judgment in favor of Witt and Hayden, Stone is affirmed.

AFFIRMED in part, REVERSED in part and REMANDED with directions.

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**[¶ 93,505] Rafal v. Geneen.**

United States District Court for the Eastern District of Pennsylvania. Civil Action No. 72-536. May 8, 1972. Full text of amended opinion and order.

**Exchange Act—Proxies—Election of Directors—Failure to Disclose Lawsuits Pending Against Nominees—Insider Trading Violations Alleged Against Nominees.**—Proxy materials sent to shareholders before the proposed election of directors were misleading because they failed to disclose that there were lawsuits alleging insider trading violations pending against three of the nominees. The failure to report these lawsuits is a defect related to the transaction for which approval was sought, the omission is one which might be considered important by a reasonable shareholder in deciding how to vote. The proxy power granted to vote for the three nominees was declared null and void, but the election of seventeen other directors was allowed to proceed. After full disclosure within the meaning of Section 14(a) of the Exchange Act with respect to the three nominees, they may be candidates for election at a later stockholders' meeting.

See ¶ 24,001 and 24,013, "Exchange Act—Proxies" division, Volume 2.

**Exchange Act—Proxies—Manner of Indicating Withholding of Vote.**—The "strike out" method of withholding a vote for the election of directors which was employed was not misleading, although the type used could have been more bold face. The type face used was not so similar to that used in the body of the proxy card as to confuse the reasonable shareholder.

See ¶ 24,008, "Exchange Act—Proxies" division, Volume 2.

HIGGINBOTHAM, District Judge: The facts have been dictated from the bench and the attached is a rough draft Memorandum and Order.[1]

The International Telephone and Telegraph Company stockholders' meeting is scheduled for Wednesday, May 10, 1972, for the election of members to the Board of Directors. In view of the time pressures in this matter, the evidence and arguments of counsel were heard the morning and afternoon of May 8, 1972; Court was then recessed and at 10:00 P. M., May 8, 1972, in open court, the findings of fact (pursuant to Rule 52a) were dictated from the bench and the attached rough draft Memorandum and Order were filed.

## I. *THE APPLICABLE LAW*[2]

§ 14(a) of the Securities Exchange Act of 1934 provides as follows:

"It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Com-

[1] The attached Memorandum has been revised slightly as to form and not as to substance. Counsel for ITT and Rafal requested that they were prepared to seek a stay from the Court of Appeals and this memorandum was prepared so that the Court of Appeals would have a written opinion stating the rationale for my Order. This Amended Opinion has been filed on May 19, 1972.

[2] For findings of fact pursuant to Rule 52, please see the notes of testimony where findings were dictated on the evening of May 8, 1972. This Memorandum constitutes the prerequisite conclusions of law for Rule 52(a), Federal Rules of Civil Procedure.



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mission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to Section 12 of this title."

In addition, in furtherance of its rule-making function the Securities and Exchange Commission (SEC) has issued Rule 14a(9) which provides the following:

"False or Misleading Statements.

"(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

The initial question under the statute and accompanying regulation is whether the failure to disclose the existence of the three aforementioned lawsuits[1] in ITT's proxy materials is proscribed by Rule 14a(9) as an omission "... to state any material fact necessary in order to make the statements therein not false ..." At the threshold the focus must first be on what is meant by "material," for purposes of Rule 14a(9). In *Mills v. Electric Auto-Lite Company*, [2] S. Ct. 616, 621 (1970), the United States Supreme Court discussed "materiality" as follows:

"Where the misstatement or omission in a proxy statement has been shown to be 'material' as it was found here to be, that determination itself indubitably embodies a conclusion that the defect was *of such a character that it might have been considered important by a reasonable shareholder who was in the process of deciding how to vote.* (Footnote omitted.) (Emphasis added.)

The Supreme Court then went on to state, at 621:

"This requirement that the defect have a significant *propensity* to affect the voting process is found in the express terms of Rule 14a(9), and it adequately serves the purpose of ensuring that a cause of action cannot be established by proof of a defect so trivial, or so *unrelated to transaction for which approval is sought* ..." (Emphasis added.)

See also, *Kahn v. American Metal Climax, et al.*, (19,175, 19,176, 19,537, 19,538, 71,109, 71,110, 71,111), Third Circuit, filed March 31, 1972, at pages 22-23, affirming as modified, 313 F. Supp. 1251 (E. D. Pa., 1970).

For the stockholders' meeting to be held on Wednesday, May 10, 1972, there are three nominees, R. Newton Laughlin, Hart Perry and Harry V. Williams, (sponsored by management) who are defendants in lawsuits where these nominees are charged with violations of the Securities and Exchange Act of 1934, § 10b relating to insider trading.[3]

The election of these persons to the Board of Directors is clearly a "transaction" for which stockholders' approval is sought within the context of § 14a. The election of a board of directors may be the most important, and in some cases the only, transaction in which the stockholder has any significant voice in determining the company's destiny. For the directors once elected are the captain of the ITT ship. Presumably, after evaluating the various areas of competition, and the winds of public policy and corporate ethics, the directors then chart the course of their multi-billion dollar conglomerate. The failure to reveal that three proposed members of the Board of Directors are defendants in lawsuits charging the perpetration of fraud is certainly a defect related to the transaction for which approval is sought and an omission which certainly must be considered important by a reasonable shareholder who is in the process of deciding how to vote. See, *Mills v. Electric Auto-Lite Company*, 90 S. Ct. 616, 621 (1970). Thus, I find both as a matter of law and fact that the failure to disclose at least the three lawsuits listed months prior to March 24, 1972, the date of the proxy statement, is a violation of § 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a).

[1] Opinion of Hon. Gerhard A. Gesell, D. D. C., Jan. 8, 1972, N. Y. pp. 129,574.

[2] Section 10(b) of the Securities Exchange Act of 1934 is "designed to protect investing stockholders against shareholding opposition by insiders" with adequate information." Louis Loss, *Securities Regulation* Vol II, 2nd Ed. (1961), p. 1041. For a complete discussion of the insider trading provisions of the 1934 Act, see Loss, Securities Regulation, Vol. V, 2909 to end (Supp. pp. 2959-3170).

There can be no doubt that having determined that the proxy is illegal and in violation of § 14(a), that there is an implied, private right of action in the plaintiff to remedy that violation. *J. I. Case v. Borak*, 84 S. Ct. 1555 (1964). See also, *Robinson v. Penn Central*, 366 F. Supp. 655 (E. D. Pa., 1971); *Cooke v. Teleprompter Corporation*, 344 F. Supp. 467 (E. D. Pa., 1971); *Beatty v. Bright*, 318 F. Supp. 169 (D. Iowa, 1970).

## II. *REMEDIES*

In the exercise of its equitable powers, on the present record, the Court has three broad choices of remedy: (1) The Court could enjoin the entire stockholders' meeting and require that new proxy statements be issued which explain adequately the three prior lawsuits. (2) Except for three of the twenty positions now up for voting, it could permit the stockholders' meeting to go forth and to permit votes to be cast for the remaining positions. As to the three vacancies involving Hart Perry, R. Newton Laughlin and Harry V. Williams, there would have to be a subsequent stockholders' meeting which would be held after proper proxy statements had gone out noting the prior lawsuits involving Perry, Laughlin and Williams, or, (3) it could deny to plaintiff any relief and permit the stockholders' meeting to go forth without any restrictions.

In *Mills v. Electric Auto-Lite Company*, supra, Mr. Justice Harlan reminded us that, "In selecting a remedy, the lower courts should exercise 'the sound discretion which guides the determination of courts of equity,' keeping in mind the role of equity as the 'instrument of nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims'."

In this delicate balancing process there are factors which militate against granting plaintiff the full relief requested. One factor is the laches doctrine. The Annual Report is dated March 8, 1972 and the Proxy Statement is dated March 24, 1972; absent proof to the contrary, I must conclude that plaintiff had notice of the proxy statement for almost five weeks, and of the Annual Report for approximately seven weeks before he requested injunctive relief on the issue of the prior lawsuits. On the other hand, defendants have had knowledge of the lawsuits for months; in their proxy statement they have elegant pictures of the directors and precise notations of their academic background and corporate experience. In short, these qualifications suggest an imprimatur of extraordinary excellence, responsibility and good judgment—on the basis of their past positions in the corporate world and in the nation. Certainly the fact that these individuals who are being asked to guide the destiny of IT&T have been charged (though admittedly not proven) with insider trading violations of the Securities Exchange Act of 1934 may be sufficient to cause some stockholders to pause before granting these individuals the important fiduciary responsibility of managing one of the world's largest corporations.

The failure to disclose these lawsuits is almost tantamount to what Judge Brieant in *Cooke v. Teleprompter*, 344 F. Supp. 467, 470 said was the exposition of facts, "while not untruthful per se, is somewhat clarted and one-sided." Thus, "the shareholders may well view the matters referred to in a different context and may or may not conclude to reelect [those three] to the management slate."

In a real sense, here, as in *Cooke*, the concepts of corporate democracy and self-determination by the shareholders are at stake.

No substantial reason has been given as to why IT&T shareholders were not informed of these suits, and no one could argue that the information would have been "trivial" or irrelevant to some stockholders. See *Mills, supra*, at p. 624. I am not unaware of the facts of corporate proxy life. Maybe it won't make any difference to a majority, maybe it will make a difference to only a few, but those few cannot be precluded from knowing the salient facts.

With the above rationale, one might ask then why shouldn't one enjoin the entire stockholders' meeting? My answer is that this violation is not of the same magnitude of many in the past where the entire meeting was enjoined. In *Robinson*, there was involved a major refinancing plan whereby the debt would have grown from $30,000,000 to $60,000,000. In *Beatty*, there would have been a merger, and *Mills* and *Borak* involved mergers. *Cooke, supra*, involved a conviction of the chairman and president on federal bribery charges.

## III. *THE PROXY CARD*

In addition to the failure to disclose the existence of several lawsuits the plaintiff



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also alleges that the means provided on the proxy cards (Exhibits 3a and 3b) to permit a shareholder to withhold a vote for the directors are so vague as to render the proxy card void. Rule 14a-4(b)(2), which regulates the form of the proxy card, provides:

"(2) A form of proxy which provides for the election of directors and for action on other specified matters shall be prepared so as *clearly to provide, by a box or otherwise*, means by which the security holder may withhold authority to vote for the election of directors. Any such form of proxy which is executed by the security holder in such manner as not to withhold authority to vote for the election of directors shall be deemed to grant such authority, provided the form of proxy so states in *boldface type*." (Emphasis added.)

My independent examination of the proxy cards submitted as Exhibits 3a and 3b reveals that both cards provide that "authority to vote said proxies *for the election of directors as stated in the proxy statement shall be deemed granted unless the security holder has lined out the words such authority is granted.*" (Bold face indicated by [italics].) While the type face used to indicate the ability to withhold a vote for directors could be more bold, I cannot say that the difference between the type face of the clause in question and the body of the proxy card is so similar as to cause confusion for the responsible shareholder upon a careful reading of the card. Thus, I conclude that while the "cards out" method of withholding a vote for the election of directors here employed could be improved, it is not here inadequate so as to require that the card be declared void.

IV

In the two strident arguments counsel for plaintiff made most caustic remarks as to the Republican Party and GULF. It should be emphasized that any findings of fact and order are not in any respect predicated on the allegations as to IT&T's purported efforts to have the Republican National Convention in San Diego [illegible] favor. Similarly, my findings are not predicated on any comments made by any counsel as to the [illegible] the United States Judiciary Committee on the nomination of the acting United States Attorney General, Richard G. Kleindienst.

*ORDER*

AND NOW, THIS [illegible] day of May, 1972, it is ordered [illegible]

the court hears to retain jurisdiction of this instant plaintiff's request [illegible] for proxy material [illegible] leaders as to the directors [illegible] line for election and who [illegible] for illegally voting or [illegible] counts in violation of the [illegible] rule of the SEC, Rule [illegible] 8.7(a)(1), such proxies [illegible] the election of [illegible] directors of [illegible] VOID and WITHOUT EFFECT.

R. Newton Lloyd
Clark Perry
Harry V. Wilson

IT IS FURTHER ORDERED [illegible] proxy designees [illegible] electing nine [illegible] to the Board of Directors [illegible] [illegible], 1972 [illegible]

After [illegible] hereby [illegible] the [illegible] [illegible] the election of the [illegible] persons on the Board of [illegible] that election a [illegible] Messrs. Lumpkin, Perry and Wilson be candidates for election. [illegible] cast fair and truthful proxy [illegible] set to review by this Court to protect [illegible] its right to [illegible] proxies [illegible] be left vacant by reason of any [illegible]

Jurisdiction of this Court is retained [illegible] determine question of the sufficiency [illegible] proxy materials prepared pursuant to this Order.

BY THE COURT

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[¶ 93,505] Sargent v. Genesco, Inc.

United States District Court, for the Middle District of Tennessee, Nashville Division, 71-197 Civ. T. K. June 1, 1972. Full text of memorandum opinion and order. For earlier matters, see ¶ 94,279, 93,157 and 93,409.

Exchange Act—Anti-fraud—Violations with respect to Soliciting Proxies—Standing to Sue.—The purchaser-seller requirement for maintaining a private action is satisfied since the plaintiffs' shares were purchased during the continuation of violations alleged to have occurred in connection with the proxy solicitation; as to sales of stock after the alleged violations, there was no allegation that the

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| JOHN W. RAFAL, on behalf of himself and all shareholders similarly situated and on behalf of INTERNATIONAL TELEPHONE & TELEGRAPH CORP., | : | CIVIL ACTION |
| | : | NO. 72-536 |
| Plaintiff | : | |
| v. | : | |
| HAROLD S. GENEEN, et al., | : | |
| Defendants | : | |

ORDER

And now this day of October, 1974, upon Petition of Plaintiff's counsel and the Affidavit of David Berger, Esquire in support thereof, it is HEREBY ORDERED AND DECREED:

1. The Petition of Plaintiff's Counsel, David Berger, P.A. Attorneys-At-Law for award of counsel fees in the amount of $55,000 and for reimbursement of out-of-pocket expenses in the amount of $1,862.49 is hereby granted and approved as fair and reasonable under the circumstances.

2. Defendant International Telephone & Telegraph Corporation is hereby directed to pay said amount to plaintiffs

counsel, within thirty days of the date of this Order.

A. Leon Higginbotham, Jr. /s/
J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ESTHER JACOBY,

Plaintiff,

-against-

72 CIV 5442 (LWP)

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.

Defendants.

----------x

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK)

VITO VINCENTI being duly sworn, deposes and says:

I am a member of the firm of VINCENTI & SCHICKLER, ESQS., the attorneys for the defendants in this action, and I am fully familiar with the facts herein, having beein in charge of the defense of this action since its inception. I make this affidavit in support of the instant application of the defendants to disaffirm the Report and Recommendation of Magistrate Goettel on the issue of attorneys' fees and for the denial, in its entirety, of plaintiff's application for attorneys' fees or, in the alternative, for a reduction in the amount of the recommended award or, in the alternative, for a denial of the application of the plaintiff for a disaffirmance of the Report and Recommendation of Magistrate Goettel and an increase in attorneys' fees.

Pursuant to the judgment of this Court before Judge Pierce d ated January 28, 1974, the question of the granting of attorneys' fees was ". . . set down by the Court for a hearing to be held on due notice to Vornado. . . " and, thereafter, the issue

of attorneys' fees was referred to Magistrate Gerard L. Goettel for Report and Recommendation. After hearing argument by the attorneys for the parties herein, Magistrate Goettel rendered his Report and Reco-mendation dated June 25, 1975 wherein the Magistrate recommended an award of legal fees to plaintiff's attorneys in the amount of $10,000.00 plus disbursements of $211.44.

This affidavit and the accompanying memorandum of law of the defendants is submitted in this proceeding on the question of attorneys' fees in support of defendants' application herein to disaffirm the award and to deny plaintiff's application for attorneys' fees and, in the alternative, as aforesaid.

The pertinent factual information is set forth in the affidavit of Vito Vincenti, Esq. sworn to the 22nd day of May, 1975 and which was submitted to Magistrate Goettel in opposition to the plaintiff's application for attorneys' fees. The exhibits pertaining to this proceeding and which are submitted by defendants herein are attached to that affidavit. Moreover, the arguments of the defendants in opposition to the application of the plaintiff for attorneys' fees are delin·ated in that affidavit and in the memorandum of law of the defendants submitted to Magistrate Goettel in the same proceeding. It is respectfully requested that that affidavit, those exhibits and that memorandum of law be deemed a part of this affidavit and this application to the Court.

The memorandum of law in support of the defendants' instant application for disaffirmance, etc, substantially outlines the defendants' arguments in support of their position. No further factual information is necessary to be set forth in this affidavit. Annexed hereto is a copy of the Report and Recommendation

of Magistrate Goettel dated June 25, 1975.

WHEREFORE, it is respectfully requested that defendants' instant application be in all respects granted.

VITO VINCENTI

Sworn to before me this
22nd day of September, 1975

KENNETH M. WEINMAN
Notary Public, State of New York
No. 41-4602124
Qualified in Queens County
Commission Expires March 30, 19 77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER JACOBY,

Plaintiff,

- v -

ALFRED B. AVERELL, et al.,

Defendants.

72 Civ. 5441

#43425

MICROFILM
NOV 20 1975

FILED
U.S. DISTRICT COURT
S.D. OF N.Y.
NOV 19 4 37 PM '75

APPEARANCES:

CAHILL & BRONZAFT
1501 Broadway
New York, New York 10036

Attorneys for Plaintiff

VINCENTI & SCHICKLER
225 Broadway
New York, New York 10007

Attorneys for Defendants

LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

In an Opinion filed January 16, 1974, this Court found that certain amendments to a qualified stock option plan of defendant Vornado, Inc. violated the provisions of the original qualified stock option plan and thus were void. The Court also determined that the case presented

no violations of the federal securities laws. The action was then referred to Magistrate Goettel for hearing and recommendation as to an award of attorney's fees to plaintiff, a derivative shareholder. On June 25, 1975, the Magistrate recommended that an award of $10,000 plus $211.44 for disbursements be made to plaintiff. The Magistrate reasoned that, although the action had created no "common fund" for the corporation within the meaning of Mills v. Electro Auto-Lite Co., 390 U.S. 375, 393-94 (1970), some fees should be awarded in that the options might have worked some financial detriment to the corporation had they not been declared void as a result of the action. Further, the Magistrate noted the efforts of plaintiff's counsel in diligently pursuing the action and the fact that the case, at the time it was brought, presented novel questions of law. Accordingly, the Magistrate recommended an award of approximately one-fourth the amount sought by the plaintiff. Both parties object to the recommendation, plaintiff's counsel asserting that it is entitled to $40,000 in fees and defendant asserting that no fees should be granted at all.

There is no dispute that plaintiff's counsel has shown adequate proof of the nature of the professional services for which compensation is sought. See City of

Detroit v. Grinnel Corp., 495 F.2d 448, 463-73 (2d Cir. 1974). The only real question is whether the action resulted in a benefit to the corporation.

Much of the attention of the parties has been directed to Judge Ryan's denial of attorneys' fees in Waltner v. Billera, 72 Civ. 2052 (S.D.N.Y. January 16, 1975). Waltner, like the instant action, resulted in a determination that certain amendments to a stock option plan were void and further, like the instant action, that no violations of the federal securities laws were present. Id. CCH Fed. Sec. L. Rep. ¶94,001 [1973 Binder] (S.D.N.Y. 1973). In its principal decision in this action, this Court observed that plaintiff's action was extremely similar to that presented in Waltner.

In his order denying any award of attorneys' fees to the Waltner derivative plaintiff, Judge Ryan concluded that plaintiff had failed to show any substantial benefit flowing to the corporation as a result of the derivative action. While recognizing that the benefit need not be in the form of a cash fund, Judge Ryan concluded that the invalidation of the stock option amendments "resulted in a supposed benefit of so uncertain a nature as to preclude compensation by the corporation." Waltzer,

supra, 72 Civ. 2052 (S.D.N.Y. January 16, 1975).

Following the denial of the award, plaintiff in Waltzer took an appeal to the Second Circuit. However, in a conference with the Court of Appeals Staff Counsel, the parties entered into a settlement whereby defendants agreed to pay plaintiff's counsel $40,000 of the $62,000 demanded. The dismissal of the appeal was thereafter "So Ordered" by Chief Judge Kaufman.

In this action, plaintiff asserts that the $40,000 settlement in Waltzer must be regarded as of precedential value in that awards of fees must be court-approved. Defendants assert that Judge Ryan's order denying the award is the only legal precedent which Waltzer provides. The Magistrate elected to ignore the Waltzer case entirely and proceeded to evaluate the instant case as if Waltzer had never existed.

In this Court's view, Judge Ryan's decision regarding fees in Waltzer must be regarded as some precedent. The subsequent appeal of that order was never taken before a panel of the Circuit and Judge Kaufman's consent to the discontinuance of the appeal cannot possibly be viewed as a reversal of the decision below. However, the fact that Judge Ryan's denial of fees in Waltzer stands as

precedent does not necessitate that this Court deny all fees in this action.

The Court is in agreement with the Magistrate's conclusion that this action did result in a benefit to the corporation. As the Magistrate observed, "while the harm averted was speculative (and the action eventually proved unnecessary), it had an actual value at the time and there was a therapeutic value to voiding options which were not authorized by its shareholders." (Report at 8); see Murphy v. North American Light and Power, 33 F.Supp. 567, 570-71 (S.D.N.Y. 1940). While this action did not result in any finding of a securities law violation, the decision did declare the amendments void. It is important for the well-being of a corporate entity that its shareholders have available the device of the derivative action to correct actions of management which are unauthorized and which may result in personal financial benefits flowing to corporate officers.

As the Supreme Court stated in Mills, supra:

> "[P]rivate shareholder actions of this sort 'involve corporate therapeutics', and furnish a benefit to all shareholders by providing an important means of enforcement . . . ." (Mills, supra 396 U.S. at 396, quoting Murphy v. North American Light & Power, supra.)

In addition, it cannot be doubted that the decision in Waltzer and in the instant action operated to place one limit upon the extent to which management can modify shareholder-approved stock option plans in order to suit its own desires. Thus, the precedential effect of the action is also an appropriate consideration, as the Magistrate noted. Report at 8; see Mills, supra, 396 U.S. at 393; Sprague v. Ticonic National Bank, 307 U.S. 161 (1939). Thus, in the Court's view, the fact that none of the challenged options were exercised does not preclude a finding of benefit to the corporation. Certainly, if the market price of the stock of Vornado, Inc. had risen instead of fallen, and if this action had not been brought, Vornado's corporate officers could have taken personal financial advantage of the unauthorized options. Thus, the Court concludes that an award of attorneys' fees is warranted.

However, the Court also finds itself in agreement with the observation of the Magistrate to the effect that the absence of an actual cash fund should affect the size of the award. Such an approach also serves to harmonize the result herein with Judge Ryan's decision on fees in Waltzer. Thus, the Court determines that an award of

$10,000 plus disbursements is fair and equitable under all the circumstances. Accordingly, the amount recommended by the Magistrate is adopted, and plaintiff's counsel shall recover $10,211.44 from the defendant. Counsel for plaintiff is directed to submit an appropriate order.

SO ORDERED.

Dated: New York, New York
November 19, 1975

LAWRENCE W. PIERCE
U. S. D. J.

DIRECT PIERCE) P. 186a

Final Order and Judgment dated Dec. 23, 1975

FILED
DEC 23 1975
S. D. OF N. Y.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ESTHER JACOBY,

Plaintiff,

-against-

ALFRED B. AVERELL, CHARLES M. EDWARDS, JR., DONALD B. GOMES, ALVIN C. MARTIN, SOLOMON ROGOFF, STANLEY SIMON, HORACE R. ZIMMERMAN, FREDERICK ZISSU and VORNADO, INC.,

Defendants.

72 Civ. 5441 (LWP)

FINAL ORDER AND JUDGMENT

An application having been made by plaintiff for an award of fees to her attorneys and accountants in this stockholders' derivative action; that the Court having referred the question of an award to plaintiff's counsel to Magistrate Gerard L. Goettel for a hearing and recommendation; Magistrate Goettel having received papers from plaintiff supporting a request for a $40,000 fee award together with necessary disbursements of $211.44 and papers from defendant Vornado, Inc. requesting that plaintiff's counsel not be awarded fees in this action; Magistrate Goettel, after a hearing, recommended in his June 25, 1975 Report and Recommendation, that plaintiff's counsel be awarded a fee of $10,000 plus $211.44 in out-of-pocket disbursements; that both parties moved to set aside the Magistrate's recommendation; that after the submission of additional papers by both parties and after studying the entire record, this Court adopted in its Opinion and Order of November 19, 1975, the amount recommended by Magistrate Goettel, namely, $10,000 in legal fees

this day of 19

and $211.44 in out-of-pocket disbursements;

NOW THEREFORE, upon the Opinion and Order (Opinion #43425) of this Court, dated and filed November 19, 1975,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. Plaintiff's attorneys, Garwin & Bronzaft, are awarded attorneys' fees in the amount of $10,000 plus out-of-pocket disbursements of $211.44 for the services they rendered in this action.

2. Defendant Vornado, Inc. is hereby directed to pay the amount of $10,211.44 to Garwin & Bronzaft within seven (7) days from the entry of this Order and Judgment.

3. In the event of non-payment of the above fees and disbursements, then, judgment for the entire balance then due and owing may be entered upon either the affidavit of Sidney L. Garwin or Bertram Bronzaft.

4. This Court reserves jurisdiction over the subject matter and the parties to this proceeding solely for the purpose of enforcing the terms and provisions contained herein.

Dated: New York, N.Y.
December 16, 1975

U.S.D.J.

JUDGMENT ENTERED-12-23-75
Raymond F. Burghardt
CLERK

this day of

A of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

COURT OF APPEALS
FOR THE SECOND CIRCUIT

JACOBY,
Plaintiff - appellee - appellant

- against -

AVERELL, et al
Defendants - appellant - appellee

*Index No.*

*Affidavit of Personal Service*

*STATE OF NEW YORK, COUNTY OF* NEW YORK *ss.:*

*I,* Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

*That on the* 19th *day of* April *19* 76 *at* 450 Park Avenue, New York New York

*deponent served the annexed* Appendix ~~Brief~~ *upon*

Jack Dashoa

*the* Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

*Sworn to before me, this* 19th
*day of* April *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Reuben Shearer

Reuben Shearer